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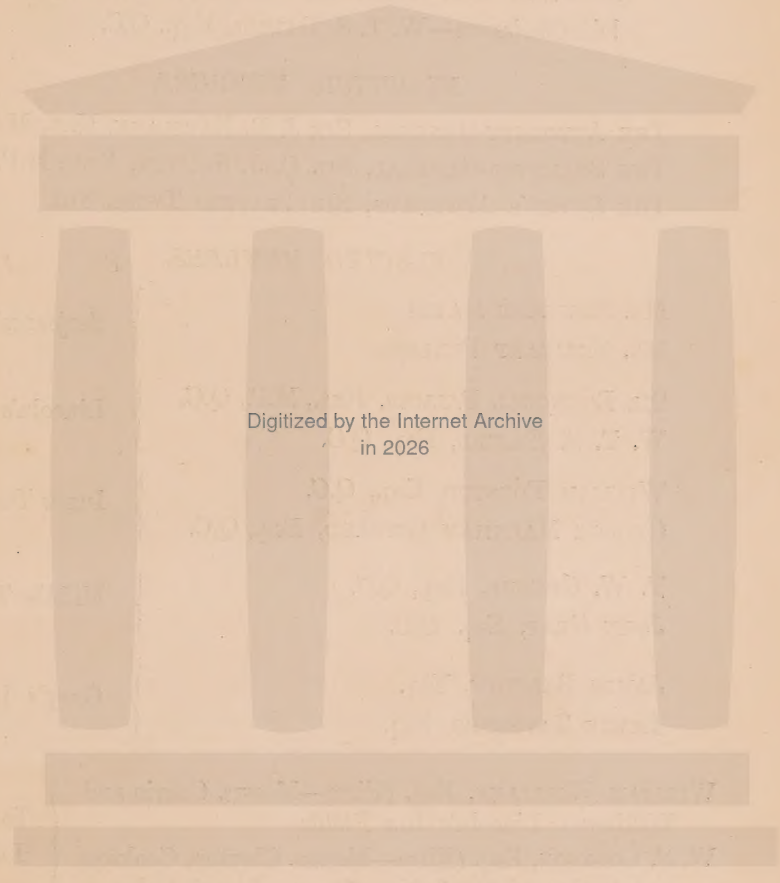

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November 4th, 1867.

THE

LAW REPORTS.

High Court of Admiralty,

AND

Ecclesiastical Courts.

REPORTED BY

ERNST BROWNING, Barrister-at-Law.

EDITED BY

JAMES REDFOORD BULWER, Q.C.

VOL. I.

FROM MICHAELMAS TERM, 1865, TO TRINITY TERM, 1867,
BOTH INCLUSIVE.

XXIX & XXX VICTORIA.

LONDON:
PRINTED FOR THE COUNCIL OF LAW REPORTING
BY WILLIAM CLOWES AND SONS,
DUKE STREET, STAMFORD STREET; AND 14, CHARING CROSS.
PUBLISHING OFFICE, 51, CAREY STREET, LINCOLN'S INN, W.C.
1867.

BIBL.
LONDIN.
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JUDGE

OF

THE HIGH COURT OF ADMIRALTY

AND

THE ECCLESIASTICAL COURTS,

XXIX & XXX VICTORIA.

The Right Hon. STEPHEN LUSHINGTON, D.C.L.

QUEEN'S ADVOCATE:

Sir ROBERT PHILLIMORE, Knt., D.C.L.

ADMIRALTY ADVOCATE:

Dr. TRAVERS TWISS, Q.C.

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ERRATUM.

Page 48, line 3 from bottom, dele "*Cur. adv. vult.*"

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CASES

DETERMINED BY THE

HIGH COURT OF ADMIRALTY

AND BY THE

ECCLESIASTICAL COURTS,

IN AND AFTER

MICHAELMAS TERM, XXIX VICTORIA.

THE HELEN.

1865
Nov. 7.

Wages—Illegality—Breach of Blockade.

By principle, authority, and usage, it is not a municipal offence by the law of nations for a neutral to carry on trade with a blockaded port.

In a suit for wages, upon an agreement entered into for the purpose of breaking the blockade of the Confederate States of America; an article in the defendants' answer alleging such agreement to be contrary to law, ordered to be struck out.

In this case, the master sued for wages upon an agreement entered into between himself and the defendants, the owners of the *Helen*.

The defendants, in the fourth article of their answer, alleged that "the agreement was made and entered into for the purpose of running the blockade of the Southern ports of the United States of America, or one of them, and was and is contrary to law, and cannot be recognised or enforced by this Honourable Court."

July 25. *Brett, Q.C.*, and *E. C. Clarkson*, for the plaintiff, moved the Court to reject the fourth article of the defendants' answer.

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THE HELEN.

Milward, Q.C., and *Pritchard*, for the defendants, supported the answer.

The facts and the cases cited are fully reviewed in the judgment.

Cur. adv. vult.

Nov. 7. DR. LUSHINGTON. This is a motion by the plaintiff to reject the fourth article of the defendants' answer. The parties in this cause are John Andrews Wardell, formerly the master of the *Helen*, plaintiff, and the Albion Trading Company, the owners of the ship, defendants. The master sues for wages (with certain premiums added) alleged to have been earned between July, 1864, and March, 1865. The answer states that according to the agreement as set forth by the defendants, the plaintiff has been paid all that was due to him. This part of the answer is not objected to. The fourth and last article is the one objected to—It alleges that the agreement was entered into for the purpose of breaking the blockade of the Southern States of America; that such an agreement is contrary to law, and cannot be enforced by this Court. In the course of the argument, the judgment in *Ex parte Chavasse re Grazebrook*, (1) was cited as governing the case; a judgment recently delivered by Lord Westbury whilst he was Lord Chancellor. The law there laid down is briefly stated, that a contract of partnership in blockade-running is not contrary to the municipal law of this country; and by the decree the partnership was declared valid, and the accounts ordered accordingly. It was admitted that this decision is directly applicable to the present case, a suit to recover wages according to a contract with respect to an intended adventure to break the blockade.

That a decision of the Lord Chancellor is to be treated by this Court with the greatest respect there can be no doubt, but is it absolutely binding? There are three tribunals whose decisions are absolutely binding upon the Court of Admiralty: 1. The House of Lords. 2. The Privy Council. 3. The Courts of Common Law when deciding upon the construction of a statute. If a decision of any of these tribunals is cited, all that the Court of

(1) 11 Jurist (N.S.) 400; 34 L.J. (Bkr.) 17.

655.

Admiralty can do is to inquire if the decision is applicable to the case. If so, then it is the duty of the Court to obey, whatever may be its own judgment.

No other decisions are, I believe, absolutely binding on the Court. On the present occasion, no decision has been cited from the House of Lords or Privy Council. Whatever, therefore, may be the effect of the decisions of other tribunals, I am not relieved from the duty of reconsidering the whole question.

An intimation has been given that this case will be carried to the Judicial Committee; if so, I apprehend that tribunal might be inclined to consider me remiss in my duty if I had omitted to form an independent judgment on the case, and to state it with my reasons. It is, I conceive, admitted on all hands, that the Court must enforce the agreement with the master, unless it is satisfied that such agreement is illegal by the municipal law of Great Britain. In order to prove this proposition, the defendants say that the agreement to break the blockade by a neutral ship is, on the part of all persons concerned, illegal according to the law of nations, and that the law of nations is a part of the municipal law of the land—*ergo*, this contract was illegal by municipal law.

Now, a good deal may depend on the sense in which the word "illegal" is used. I am strongly inclined to think that the defendants attach to it a more extensive meaning than it can properly bear, or was intended to bear by those who used it. The true meaning, I think, is that all such contracts are illegal so far, that if carried out, they would lead to acts which might, under certain circumstances, expose the parties concerned to such penal consequences as are sanctioned by international law, for breach of blockade, or for the carrying of contraband. If so, the illegality is of a limited character. For instance, suppose a vessel after breaking the blockade completes her voyage home, and is afterwards seized on another voyage, the original taint of illegality—whatever it may have been—is purged, and the ship cannot be condemned; yet if the voyage was, *ab initio*, wholly and absolutely illegal, both by the law of nations and the municipal law, why should its successful termination purge the offence? Let me consider the relative situation of the parties. A neutral country has a right to

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trade with all other countries in time of peace. One of these countries becomes a belligerent, and is blockaded. Why should the right of the neutral be affected by the acts of the other belligerent? The answer of the blockading power is: "Mine is a just and necessary war," a matter which, in ordinary cases, the neutral cannot question, "I must seize contraband, I must enforce blockade, to carry on the war." In this state of things there has been a long and admitted usage on the part of all civilized states—a concession by both parties, the belligerent and the neutral—a universal usage which constitutes the law of nations. It is only with reference to this usage that the belligerent can interfere with the neutral. Suppose no question of blockade or contraband, no belligerent could claim a right of seizure on the high seas of a neutral vessel going to the port of another belligerent, however essential to his interest it might be so to do.

What is the usage as to blockade? There are several conditions to be observed in order to justify the seizure of a ship for breach of blockade. The blockade must be effectual and (save accidental interruption by weather) constantly enforced. The neutral vessel must be taken *in delicto*. The blockade must be enforced against all nations alike, including the belligerent one. When all the necessary conditions are satisfied, then, by the usage of nations, the belligerent is allowed to capture and condemn neutral vessels without remonstrance from the neutral state. It never has been a part of admitted common usage that such voyages should be deemed illegal by the neutral state, still less that the neutral state should be bound to prevent them; the belligerent has not a shadow of right to require more than universal usage has given him, and has no pretence to say to the neutral: "You shall help me to enforce my belligerent right by curtailing your own freedom of commerce, and making that illegal by your own law which was not so before." This doctrine is not inconsistent with the maxim that the law of nations is part of the law of the land. The fact is, the law of nations has never declared that a neutral state is bound to impede or diminish its own trade by municipal restriction. Our own Foreign Enlistment Act is itself a proof that to constitute transactions between British

subjects, when neutral and belligerents, a municipal offence by the law of Great Britain, a statute was necessary. If the acts mentioned in that statute were in themselves a violation of municipal law, why any statute at all? I am now speaking of fitting out ships of war, not of levying soldiers, which is altogether a different matter. Then how stands the case upon authority? I may here say, that in principle, there is no essential difference whether the question of breach of municipal law is raised with regard to contraband or breach of blockade.

Mr. Duer is the only text-writer who maintains an opinion contrary to what I have stated to be the law. He maintains it with much ability and acuteness, but he stands alone. He himself admits that an insurance of a contraband voyage is no offence against municipal law of a neutral country, according to the practice of all the principal states of continental Europe. (1) In the American courts the question has been more than once agitated, but with the same result. In the case of *The Santissima Trinidad,* (2) Mr. Justice Story says:—"It is apparent that, though equipped as a vessel of war, she (*The Independencia*) was sent to Buenos Ayres on a commercial adventure, contraband, indeed, but in no shape violating our laws or our national neutrality. If captured by a Spanish ship of war during the voyage, she would have been justly condemned as good prize, and for being engaged in a traffic prohibited by the law of nations. But there is nothing in our law or in the law of nations that forbids our citizens from sending armed vessels as well as munitions of war to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit, and which only exposes the persons engaged in it to the penalty of confiscation." . . . . "There is no pretence for saying that the original outfit on the voyage was illegal." Again, in *Richardson* v. *The Marine Insurance Company,* (3) Parsons, C.J., observes:—"The last class we shall mention is the transportation by a neutral of goods contraband of war to the country of either of the belligerent powers. And here, it is said, that these voyages are prohibited by the law of nations, which forms a part of the municipal law of

(1) Duer on 'Marine Insurance,' vol. i. lect. vii.

(2) 7 Wheaton's Rep. 340.

(3) 6 Massachusetts Rep. 112.

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THE HELEN.

every state, and, consequently, that an insurance on such voyages made in a neutral state is prohibited by the laws of that state, and therefore, as in the case of an insurance on interdicted commerce, is void. That there are certain laws which form a part of the municipal laws of all civilized states, regulating their mutual intercourse and duties, and thence called the law of nations, must be admitted: as, for instance, the law of nations affecting the rights and the security of ambassadors. But we do not consider the law of nations, ascertaining what voyages or merchandize are contraband of war, as having the same extent and effect. It is agreed by every civilized state that, if the subject of a neutral power shall attempt to furnish either of the belligerent sovereigns with goods contraband of war, the other may rightfully seize and condemn them as prize. But we do not know of any rule established by the law of nations that the neutral shipper of goods contraband of war is an offender against his own sovereign, and liable to be punished by the municipal laws of his own country. When a neutral sovereign is notified of a declaration of war, he may, and usually does, notify his subjects of it, with orders to decline all contraband trade with the nations at war, declaring that, if they are taken in it, he cannot protect them, but not announcing the trade as a violation of his own laws. Should their sovereign offer to protect them, his conduct would be incompatible with his neutrality. And as, on the one hand, he cannot complain of the confiscation of his subjects' goods, so, on the other, the power at war *does not impute to him* these practices of his subjects. A neutral merchant is not obliged to regard the state of war between other nations, but if he ships goods prohibited *jure belli*, they may be rightfully seized and condemned. It is one of the cases where two conflicting rights exist, which either party may exercise without charging the other with doing wrong. As the transportation is not prohibited by the laws of the neutral sovereign, his subjects may lawfully be concerned in it; and, as the right of war lawfully authorizes a belligerent power to seize and condemn the goods, he may lawfully do it." Lastly, in *Seton, Maitland, & Co.* v. *Low*, (1) Mr. Justice Kent says:—"I am of opinion that the contraband goods

(1) 1 Johnson's Cases in the Supreme Court, New York, p. 5.

were lawful goods, and that whatever is not prohibited to be exported by the positive law of the country is lawful. It may be said that the law of nations is part of the municipal law of the land, and that by that law contraband trade is prohibited to neutrals, and, consequently, unlawful. This reasoning is not destitute of force; but the fact is that the law of nations does not declare the trade to be unlawful. It only authorizes the seizure of the contraband articles by the belligerent powers."

Then as to the text-books, I need only give the references to them:—

Arnould, pp. 763, 764; 766—773. *Kent's Comm.* iii. 367. *Marshall on Marine Insurance*, p. 37. *Maud and Pollock*, p. 309. *Twiss*, ii. 297. *Parson's Maritime Law*, ii. 95. *Phillips on Insurance*, c. 3, s. 2, p. 163.

In the English Courts the only case in which the point has been actually decided is the recent case before the Lord Chancellor, which I have already adverted to. With regard to the cases (1) in Mr. Duer's book, *Naylor* v. *Taylor*, (2) *Medeiross* v. *Hill*, (3) it is enough to say that, in the view which the court eventually took of the facts, the question of law did not arise. It is in these two cases impossible to say with certainty what was the opinion of the judges at nisi prius.

I cannot entertain any doubt as to the judgment I ought to pronounce in this case. It appears that principle, authority, and usage unite in calling on me to reject the new doctrine that, to carry on trade with a blockaded port, is or ought to be a municipal offence by the law of nations. I must direct the 4th article of the answer to be struck out. I cannot pass by the fact that the attempt to introduce this novel doctrine comes from an avowed *particeps criminis*, who seeks to benefit himself by it. As he has failed on every ground, he must pay the cost of his experiment.

(1) Cited and commented on in vol. i. pp. 690, 755, 774.
(2) 9 B. & C. 718. (3) 8 Bing. 231.

1865
Nov. 7.

THE MARY ANN.

Master's Wages—Disbursements—Maritime Lien—Admiralty Court Act, 1861, 24 Vict. c. 10, s. 10.

Under the 10th section of the Admiralty Court Act, 1861 (24 Vict. c. 10), the master has a maritime lien both for his wages and disbursements, and his claim is therefore to be preferred to the claim of a mortgagee.

THIS was a suit by the master of the *Mary Ann* for his wages and disbursements. The case came before the Court on a motion by the plaintiff to reject the answer of the defendant, a mortgagee of the vessel intervening.

Vernon Lushington appeared for the master.

E. C. Clarkson for the mortgagee.

The facts are sufficiently stated in the judgment.

Cur. adv. vult.

NOV. 7. DR. LUSHINGTON. The facts of this case are as follow:—In August, 1864, Arthur James Thorman was the sole owner of the vessel. On the 15th of that month he executed a mortgage of her to the defendant, George Tanner, for 1100*l.*, and on the 29th of November, 1864, a bill of sale to William Jarman. William Jarman, on the 9th of January, 1865, executes a second mortgage of her to Arthur James Thorman for 500*l.*, and transfers the vessel to George William Thomas, and procures the mortgage of 9th of January, to be given up, so that George William Thomas became sole owner, subject to the mortgage of 15th of August, 1864, to George Tanner. On the 22nd of December, 1864, before the last transfer had been executed, but no doubt after it had been agreed upon between the parties, George William Thomas hires the plaintiff (W. F. Sewell) as master, and the vessel shortly after proceeds to sea in plaintiff's charge. Meeting with bad weather, the plaintiff puts into Flushing, and there grants a bottomry bond. On the return of the vessel to this country at Swansea, in the month of February in the present year, the vessel was arrested at the suit of the bottomry bondholder. On the 13th of April the plaintiff instituted this cause to recover his wages and disbursements, entered a caveat against the release of the vessel, and on

the 20th filed a citation *in rem*. Considerable delay seems to have taken place in the conduct of the cause. It was not till the 15th of May that an appearance was entered on behalf of George Tanner, the mortgagee; on the 26th of May, the plaintiff's petition was filed. The defendant allowed the time for putting in an answer to go by, and was obliged to make a special application to the court on the 11th of July for leave to put in his answer. This was accordingly done. The answer, amongst other things, states that the mortgage of the 15th of August, 1863, contained a covenant that the vessel should not leave the port of London until the mortgage had been paid off, and that to secure this covenant the certificate of registry was deposited with the defendant, and that this covenant contained in the mortgage was subsequently communicated to George William Thomas. That, nevertheless, G. W. Thomas, acting in collusion with the plaintiff, and behind the back of the defendant Tanner, caused the vessel to be sent to sea, the vessel, of course, going without any certificate of registry on board; and that the plaintiff is conspiring with G. W. Thomas to defeat the defendant's rights, and has made fraudulent claims for wages and disbursements.

Under these circumstances, the defendant insists that his right as mortgagee is superior to that of the plaintiff as master. On the 26th of July the plaintiff moved the Court to reject the answer of the defendant. The principal question raised is, what are the rights of a master as against the mortgagee—first, in respect of his wages; and, secondly, in respect of his disbursements? To deal with the question as to his wages first. Formerly the master had no lien upon the ship for his wages: *Smith* v. *Plummer*. (1) By the 16th section of the 7 & 8 Vict. c. 112 he first acquired the same rights of lien for the recovery of his wages as a seaman, but only in the case of the bankruptcy of the owner, but this restriction was taken off by the 191st section of the Merchant Shipping Act, 1854, which enacts that "Every master of a ship shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of his wages which by this act, or by any law or custom, any seaman, not being a master, has for the recovery of his wages." But this was not sufficient, for the sea-

(1) 1 B. & Ad. 575.

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man could not recover wages in the Admiralty Court, if there were a special contract respecting the same; and as the master's wages are almost invariably determined by special contract, his position was not greatly improved by the Merchant Shipping Act, 1854. Now, however, this difficulty has ceased to exist, for by the 10th section of the Admiralty Court Act, 1861 (24 Vict. c. 10), it is enacted that "The High Court of Admiralty shall have jurisdiction over any claims by a seaman of any ship for wages earned by him on board the ship, whether the same be due under a special contract or otherwise, and also over any lien by the master of any ship for wages earned by him on board the ship." There is no doubt that the claim of a seaman for his wages overrides that of a mortgage; it follows, therefore, that the master claiming his wages is to be preferred also to the mortgagee.

With regard to the master's disbursements, the case is somewhat different. Previous to the Merchant Shipping Act, 1854, the master's only remedy to recover his disbursements was by a personal action in the courts of common law against the owner. That act for the first time enabled the master to sue in this court for his disbursements, but only under special circumstances. The 191st section of that act provides that "If, in any proceeding in any Court of Admiralty, or Vice-Admiralty, touching the claim of a master to wages, any right of set-off or counter-claim is set up, it shall be lawful for such court to enter into and adjudicate upon all questions, and to settle all accounts then arising or outstanding and unsettled between the parties to the proceeding, and to direct payment of any balance which is found to be due." So, then, if in a suit by a master for his wages, a counter-claim was set up, he might prefer a claim for his disbursements, and in such case it was the practice of the Court to enforce against the ship the payment of the balance found to be due to the master in respect of disbursements as well as wages; and this equally whether the defendant was the owner or the mortgagee: *The Glentanner.* (1) But under that act, a master could not initiate a suit in this Court to recover his disbursements. It was partly to remedy this defect that the Admiralty Court Act, 1861, was passed. By the 10th section it is provided:—"The High Court of Admiralty shall have

(1) Swab. 415.

jurisdiction over any claim by a seaman of any ship for wages earned by him on board the ship, whether the same be due under a special contract or otherwise, and also over any claim by the master of any ship for wages earned by him on board the ship, and for disbursements made by him on account of the ship; provided always that if in any such cause the plaintiff do not recover fifty pounds, he shall not be entitled to any costs, charges, or expenses incurred by him therein, unless the judge shall certify that the cause was a fit one to be tried in the said court."

The question now before the Court is whether, under this section the master's claim for his disbursements is to be preferred to the claim of a mortgagee. In the course of the argument some stress was laid upon the words, "the High Court of Admiralty shall have jurisdiction," as purporting to confer a maritime lien, and reference was made to the case of *The Bold Buccleugh.* (1) But it is to be recollected that the Admiralty Court Act, 1861, so far from prescribing a proceeding *in rem* as the proper and only remedy, distinctly enacts, by the 35th section, that "the jurisdiction conferred by that act on the High Court of Admiralty, may be exercised either by proceedings *in rem*, or by proceedings *in personam*." There is a clear distinction between a maritime lien and a claim the payment of which the Court has power to enforce from the ship and freight. A maritime lien springs into existence the moment the circumstances give birth to it, as damage, salvage, and wages. But it does not follow that because a claim may, by act of parliament, be enforceable against the *res*, that therefore it is created a maritime lien. Besides, looking to the whole act, it is impossible to maintain that a maritime lien is created by every one of numerous sections which commence with the words, "the High Court of Admiralty shall have jurisdiction." In some of the sections these words are accompanied by a proviso incompatible with a maritime lien, as is pointed out by Mr. Maclachlan in reference to the 4th section, and as the Court has held with regard to the 5th section in the case of the *Pacific.*(2) So also it could hardly be argued that it was intended to create a maritime lien by the 8th section in favour of co-owners, or by the 11th section in favour of mortgagees. In my opinion the words, "the

(1) 7 Moore, P.C.

(2) Brown v. Lark 243; 10 Jur. Ad. 32.

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High Court of Admiralty shall have jurisdiction" mean only what they purport to say, neither more nor less; that is, that the Court shall take judicial cognizance of the cases provided for. By themselves the words leave open the question whether or not a maritime lien is created. The answer to this question depends upon other considerations. The jurisdiction conferred upon the Court by the Admiralty Court Act, 1861, embraces a number of matters widely different one from another. By some sections a jurisdiction is conferred entirely new over matters which before never came before the Court, as questions between co-owners, dealt with by the 8th section. In other sections the jurisdiction is only extended with regard to matters of which the Court previously had a limited jurisdiction, being able to take cognizance of them only under certain special circumstances. Of this latter kind is the case of the master's disbursements. So also are the cases of seamen's wages and damages. Now, in determining whether, in these cases of extended jurisdiction, it was meant to create a maritime lien, or what was the intention of the legislature, the Court will look to the law as it stood before the late act. For, supposing that before the act this Court had jurisdicton to deal with any subject matter in certain cases, and those only, and that in those cases the Court was bound to recognise the existence of a maritime lien; and supposing that by this act the legislature extended the jurisdiction so as to enable the Court to deal with the same subject matter in other cases also; then I think that in such other cases, and with regard to the same subject matter, the legislature must be taken (notwithstanding the absence of any express words) to have intended to create a maritime lien. For instance, I think under this act a seaman would have a maritime lien for his wages, although fixed by special contract, because, before the act, he had such a lien for wages earned not under any special contract. And for a similar reason there would be a maritime lien for damage done by any ship. If this be so, then under this act the master claiming for disbursements is to be preferred to the mortgagee, because, before the act, his claim for his disbursements was entitled to a similar preference in the only case where the Court could take cognizance of such disbursements, namely, in the case of a set-off. I wish it to be distinctly understood that this judgment deals only

with the 10th section of the Admiralty Court Act, 1861, and does not commit the Court to any construction of any previous act. 1865

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With regard to the allegations of fraud contained in the answer, they cannot be struck out: for, if fraud be proved, no claim which is based upon it can be maintained. (1)

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Nov. 21.

Bottomry Bond—Answer by Mortgagee.

Transactions between the owner and mortgagee of the vessel, which might render the voyage illegal, cannot invalidate a bottomry bond given by the master to a *bonâ fide* lender, who has only to look to the facts that the ship is in distress, that the master has no credit, and that the money is required for necessary purposes.

THIS was a cause of bottomry instituted by Leon Serena, the alleged holder of a bottomry bond on *The Mary Ann*, which had been given by the master at Flushing to Messrs. De Groof and Hector, and by them assigned to the plaintiff. The principal facts of the case are stated in the preceding judgment.

The answer of the mortgagee, George Tanner, intervening, alleged that the mortgage contained a covenant that the vessel should not leave the port of London until the whole of the principal sum, 1100*l.* and interest, should be repaid; that the master sailed without the certificate of registry, which remained in the defendant's possession; and also set out at great length transactions between the owner and the mortgagee, which it was alleged rendered the voyage illegal and the bond invalid.

E. C. Clarkson, for the plaintiff (Nov. 7), moved the Court to reject the admission of the answer.

T. Rutherfoord, for the defendant, in support.

Nov. 21. DR. LUSHINGTON. The answer to the petition is objected to. The contending parties are, the bondholder and the mortgagee. The answer sets forth at length transactions between

(1) See the next case.

(2) See preceding case

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the mortgagee and the owner, and alleges that, in consequence of such transactions, whereby a fraud was practised on the mortgagee, the voyage was an illegal voyage, and the bond invalid. It is not averred that the lender of the money on bottomry was cognizant of these circumstances. Admitting all the facts to be true as pleaded, I am of opinion that the position that such circumstances would avoid a bottomry bond, given to a *bonâ fide* lender ignorant of these facts, is utterly untenable; and I therefore abstain from going into particulars. I do not understand what is meant by the averment that the voyage was illegal. The voyage might be in fraud of the mortgagee; the master might violate the statute with regard to the certificate of registry; but that it was an illegal voyage, so as to affect merchants in a foreign country, who could not have the means of ascertaining these facts, is a proposition neither warranted by precedent, authority, or sound reason.

The case is too palpable for argument. What does a foreign merchant know, or what ought he to know, of mortgage, or the conditions therein? All the lender of bottomry has to look to is, that the ship is in distress; that the master has no credit; that the amount is required for necessary purposes. To require more, to demand from the lender on bottomry a knowledge of such facts as are contained in this answer, would be to impose restrictions on bottomry transactions destructive of the facility which is essential to the exigencies of commerce. As to the objection to the form of the bond, it has been decided over and over again that no particular form is necessary for a bottomry bond. The essence is, that there shall be a maritime risk to be ascertained from the contents of the bond. Maritime interest is not indispensable: *The Laurel*, (1) *Simonds* v. *Hodgson*, (2) *The Nelson*. (3)

Answer to be amended accordingly. (4)

(1) 11 Jurist, N.S. 46.
(2) 3 B. & Ad. 50.
(3) 1 Hagg. 177.
(4) See the preceding case.

THE BAHIA. 1865
Witness—Costs. *Dec.* 5.

The expenses of detaining a witness will not be allowed, unless it can be shewn that his detention was absolutely necessary to ensure his attendance as a witness, and was not for any other purpose, *e.g.*, merely to watch the proceedings in a suit.

A master's expenses at the rate of 1*l.* a week allowed from the arrest of the vessel in March, 1863, to July, 1864, when the defendants applied to have the cause put off.

THIS was originally a cause instituted against the French brig, *Bahia*, for the recovery of damages sustained by the plaintiffs in consequence of her master, Jean Louis Dugas, not having delivered a cargo of Indian corn in accordance with the terms of the bill of lading, signed by him for her cargo. The judge pronounced against the claim of the plaintiffs, and they were condemned in costs. (1)

Brett, Q.C., and *Vernon Lushington* (Nov. 7), on behalf of the defendants, moved for the amendment of the taxation of the defendants' bill of costs, in which an item of 467*l.* 10*s.* for the expenses and detention of the master had been disallowed by the Registrar.

E. C. Clarkson, opposed the motion, and supported the Registrar's report.

Cur. adv. vult.

5th Dec. DR. LUSHINGTON. In this case, I have to consider the validity of an objection taken by the defendants to the taxation of a single item in their proctor's bill of costs. The bill contained a claim for 467*l.* 10*s.* for the detention and hotel expenses of a witness for twenty-one and a quarter months, the twenty-one and a quarter months being calculated from the 17th of March, 1863, the date of the institution of the cause, to the 20th of December, 1864, one week after the delivery of the judgment. The witness was the master of the Bahia, Capt. Dugas; he was never in fact called, but the defendants maintained that he was nevertheless properly detained as a

(1) See 11 Jurist, N.S. p. 90.

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necessary witness, and that the charge of 467*l.* 10s., was a reasonable charge for such detention. The Registrar, however, disallowed the claim altogether, but finding that the master had attended in court at the hearing, to give evidence, if necessary, thought it fair to allow for the expense of such attendance, at the same rate as would be usual in the case of a witness of the same position reasonably brought to London from Ramsgate, and attending the Court for two or three days, or as would have been allowed to the master himself if he had come up for examination before an examiner. It is against this decision that the defendants now appeal. It is unnecessary for me to state the facts of this complicated case. They are set out at full length in the reported judgment of the cause. (1) I do not apprehend that there is any doubt as to the law on this subject. The Practice at Common Law in circumstances like those of the present case, so far as I can venture to give an opinion, seems to be well settled. If a party, entitled to his costs, claims costs for the detention of a witness, a strict scrutiny is made to ascertain that the witness is a necessary witness, and was detained because detention was the necessary means, to insure attendance; if it appears that though a witness he was in reality detained for another purpose, as, for instance, to watch the proceedings in the suit, his expenses will not be allowed. Still, if it is proved that the witness's attendance was required and his detention was necessary to secure it, the expenses of such detention will be recoverable as part of the costs of the suit. *Mount* v. *Larkins*, (2) *Berry* v. *Pratt*, (3) *Howes* v. *Barber*, (4) *William Dowdell* v. *The Australian Royal Mail Steam Navigation Company*. (5)

The first question then is, was the master a necessary witness? It is true that, in the event, the master was not called upon to give any evidence at all, and that the cause did not turn upon any issue of fact. Still the broad fact remains that this was a suit against the vessel in respect of the detention of the cargo. In such a suit the master can hardly fail to be a necessary witness. And in the present case it appears that the counsel for the

(1) See 11 Jurist, N.S. p. 90.
(2) 8 Bingham, 195.
(3) 1 B. & C. 276.
(4) 18 Q. B. 588.
(5) 3 E. & B. 902; 10 Jur 579

defendants did consider the master a necessary witness. Nor do I understand that this was questioned by the Registrar. It may therefore be assumed by the Court. I may add that in my opinion the fact that the master's evidence might have been taken before an examiner, at an early step of the suit, makes no difference; for, until the hearing actually took place, the master could not be sure in respect of what matters his evidence would be required. The second question is, whether it was necessary to detain the master, to secure his evidence. The Registrar, I apprehend, was of opinion that the cause of the master's detention was not that he should give evidence in this court. The master was indeed detained at Ramsgate during the whole continuance of the cause in this court from first to last, but then the beginning of the period of his detention was not coincident with the beginning of the cause nor the end with the end; his detention began on the arrival of the vessel several weeks before the arrest of the vessel, and lasted many months after the delivery of the judgment. This appears from the dates. 1863, February 2nd: master executed deed of abandonment at Ramsgate. March 13th, vessel arrested. 1864, March, 22nd: judgment of Court of Cassation. December 13th, judgment delivered in Admiralty Court. 1865, June: the master leaves Ramsgate in the Bahia, for Dunkirk. The Registrar was also of opinion that there were reasons for holding the French litigation to have been the cause of the master's detention. The vessel itself was at Ramsgate, and it was greatly to the interest of her owner that she should remain there, for the master had on the 2nd of February, 1863, executed a deed of abandonment of her; but by the French law this was not complete until a proper certificate had been given of the unnavigability of the vessel, the underwriters however disputed the abandonment, wanted to remove the vessel to Dunkirk, and in consequence the consul-general of France had prohibited the vice-consul from giving the certificate. Until, therefore, the question as to the validity of abandonment was concluded by the decree of the Court of Cassation (not delivered until the 22nd March, 1864) it was still an open question, whether the vessel remained the property of her original owner, or had passed to the under-writers,

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and, consequently, whether Captain Dugas, as being in the service of the owners, was still master. The Registrar thought that, under the circumstances, it would be natural (and I agree) that the master should remain with the vessel, watching the progress of affairs; and that if the abandonment was declared invalid, he should resume command. And this is what he actually did. He never ceased to be master (see his affidavit of 11th April, 1863), he never did leave the vessel: and, finally, he navigated her from Ramsgate to her original port of destination—Dunkirk; such seem to have been the reasons on which the Registrar acted, and certainly they are entitled to great weight. But on the other hand, what was there in the litigation with the under-writers, which rendered necessary the master's presence at Ramsgate? The place of that litigation was not at Ramsgate, nor in England, but in France. Again, the vessel was out of the control of the master, if not immediately upon the execution by him of the deed of abandonment, at all events after the vessel was placed under arrest by this court. The master was free to leave the vessel; he was a seafaring man, and his home was in France; what was there to prevent his leaving these shores, and, in the regular course of his profession, taking charge of another vessel to distant seas? How could his evidence be secured except he was expressly detained for the purpose of giving it? I may add to these considerations the fact that Mr. Weber has distinctly deposed that he was detained, and detained solely, in order to give evidence. If so detained, it makes no matter that during his detention he came up to town from time to time to give instructions to the proctor: although if his detention had been only for the purpose of enabling him to conduct the cause, the mere fact that he also gave evidence would certainly be no ground for applying for the expenses of his detention. For these reasons I cannot agree with the Registrar, who disallowed the master's claim altogether. I think, upon the whole, that it was necessary to detain him in order to secure his evidence; and that his being also occupied in the concerns of the ship, does not entirely destroy the claim. There remains then the question of quantum. The master claims no less than 467*l.* 10*s.* for his detention and hotel expenses during a period of 21¼ months. I consider this claim

exorbitant. The rate claimed is too high. It is at the rate of 22*l.* per month; whereas the master's wages on board ship were, exclusive of provisions, only 6*l.* per month. And it must be remembered, that all a witness who is detained is entitled to is maintenance according to his rank in life. I think the equity of the case is to disallow all claim for wages, as the master was engaged in the affairs of the ship, but to make a moderate allowance for subsistence. Again, the period of detention claimed for is too long. It appears that in July, 1864, when the cause was ripe for hearing, the defendants, to suit their own convenience, had the hearing put off till the November term. I consider the master cannot claim for detention during the time that the cause was unnecessarily protracted by the defendants. Upon the whole, I shall allow the defendants a sum which I think adequate to meet the necessary expenses of the master's maintenance from the arrest of the vessel on 13th March, 1863, to July, 1864, when the defendants applied to have the cause put off. I fix this sum at 1*l.* per week. I can give no costs; the claim which was made being exorbitant.

THE BONNE AMELIE.

Nov. 14.

Necessaries—Admiralty Court Act (24 *Vict. c.* 10), *s.* 5.

The expenses of an agent for coming from Newcastle to London to assist the master in the defence of a vessel prosecuted in a cause of collision, and for attending the trial:—

Held, not to be necessaries.

A CAUSE of collision had been instituted against the *Bonne Amelie*, a French schooner, and the vessel had been sold.

Vernon Lushington had moved the Court on behalf of Charles Francois Laurent, of Newcastle-upon-Tyne, agent, to pronounce the sum of 55*l.* 9*s.* 5*d.* to be due to him for necessaries supplied to the vessel, and to decree the same to be paid out of the proceeds of the sale of the vessel remaining in the registry to him or his attorney.

Mr. Stokes, proctor for the French owners, had entered a caveat against the payment of the money, not having received his proper costs from the French owners.

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DR. LUSHINGTON. This is, in point of amount, a trifling matter; but it behoves the Court to be exceedingly cautious how it exercises the power entrusted to it of paying out of the proceeds sums which are demanded as necessaries. Now, the affidavit states two different kinds of claim. One kind of claim was clearly necessaries; such as money advanced for the purchase of butcher's meat, and articles of that description, for the maintenance of the crew. I have decided before, and again decide, that this comes within the terms of the act of parliament (1) as necessaries, and that money advanced, not to pay for those necessaries where a debt has been incurred, but in order to enable the master to purchase them, is a claim against the proceeds. With respect to the other part of the claim, it is for two items, one for the expense of coming up to London from Newcastle, in order to assist the master, or for the master's interest in the defence of the vessel which was prosecuted in a cause of collision; and the second item of that description is, coming up with the master to attend the trial. Now, in no sense of the word can I consider these to be necessaries within the provision of the statute; but had there been no caveat entered here, and if the owners in France had abandoned the proceeds which remain in the registry, I should have been very much inclined to have stretched a point, and for this reason—knowing, as I do, that by the law of France the abandonment of the ship itself releases the owners from all personal responsibility, and if they had abandoned these proceeds altogether, I should then have thought myself justified in ordering this demand, which is a just demand, to be paid out of them; inasmuch as the abandonment of these proceeds would have taken away from this individual the power of bringing an action in a foreign court. As the case now stands, all I can do is to pronounce for so much of the claim as relates to what I have described as, legally speaking, necessaries. With regard to the last two items I have mentioned, I make no order.

(1) 24 Vict. c. 10, s. 5.

IN THE ARCHES COURT OF CANTERBURY.

EDWARDS AND MANN *v.* HATTON.

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Jan. 15.

Church-rate—Inequality—Pleadings—Evidence—6 & 7 Wm. 4, c. 96; 25 & 26 Vict. c. 103.

A defendant in a suit for subtraction of church-rate may by his allegation plead that he is assessed at too low a rate, and is not bound to aver or show that he himself is injured by the inequality of the assessment of which he complains.

The rent paid for lands is not a conclusive test of their value; and an assessment under the Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103), founded principally on the basis of the rent paid, and not the rent at which the property might reasonably be expected to let from year to year, according to the provisions of section 1 of the 6 & 7 Wm. 4. c. 96, is erroneous.

An assessment, made under the 25 & 26 Vict. c. 103, is evidence only, not proof, of the accuracy or inaccuracy of a valuation upon which a church-rate is made; and where a church-rate was made, in 1863, upon an old valuation of 1839, and there was no proof of any great inequality or change of value having in the interval taken place in the properties comprised in it, the Court refused to disturb the rate, upon the mere production of a new assessment made under the act, and which differed from the old valuation.

THIS was a suit (by letters of request from the Consistory Court of Norwich) for subtraction of church-rate. (1) The two principal questions for the decision of the court were, first, the general equality or inequality of various properties in the parish of Mattishall; second, whether the defendant, Hatton, could avail himself of the alleged inequality as a defence to the present suit, having regard to his particular assessment, he being assessed to the church-rate on a rateable value of 80*l.* 1*s.*, and to the poor's rate under the new parochial assessment (made in pursuance of 25 & 26 Vict. c. 103), on a rateable value of 101*l.* 15*s.* This latter value was set forth in the defendant's allegation as the true rateable value of his property. The allegation contained no averment that he was injured by the alleged inequality, and it was argued on behalf of the churchwardens that the result of all the figures before the Court failed to shew that the defendant was injured.

The libel of the plaintiffs was in the usual form. It alleged,

(1) For the earlier stages of the case see 11 Jur. (N.S.) 471; 12 L. T. Rep. (N. S.) 398, and 13 L. T. Rep. (N. S.) 253.

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among other things, the notice of vestry on the 5th of September, 1863; a vestry meeting in pursuance of such notice on the 10th of September, 1863, when a rate of 1*d.* in the pound was made; that the defendant was rightly and equally assessed on a rateable value of 80*l.* 1*s.*

The allegation of the defendant, first, denied that the notice of vestry had been affixed on the principal door of the church, and alleged that the west and not the south door, on which latter the notice had been placed, was the principal door; secondly, alleged that no valuation of properties had been made in Mattishall since the year 1839 until the valuation made under "The Union Assessment Committee Act, 1862;" that the rate in question, so far as regarded the annual and rateable values, was copied from the assessment for poor's rate which was in use up to 1863; thirdly, that certain lands and other properties mentioned in and assessed to the church-rate were let to the occupiers thereof at annual sums greatly exceeding the amounts or sums set down in the assessment as the rental or annual value thereof respectively, and that the entries thereof under the head "Rental or annual value of property" were generally the roughest, grossly inaccurate, and entirely disproportionate to the real rental or annual value of the properties against which the same were placed respectively, and that the amount at which the properties were assessed therein, as the rateable value under the head "Amount at which the property is assessed," were less than the sums at which the same would reasonably let, after deducting all usual tenants' rates, and less tithe commutation rent-charge, and the annual cost of repairs, insurance, and other expenses necessary to command such rent. Then followed 109 instances of particular properties, each of which was declared to be of a particular rateable value, "which is the sum at which it is assessed" in the new valuation hereinafter pleaded and referred to. Fourthly, that several other of the assessments to the rate were made upon the rack rentals or annual value, or at nearly the rack rentals, or at sums exceeding the rack rentals or annual value thereof, or the rentals actually paid for the same, or the sums at which the same properties would reasonably let after deducting, &c. (as in last article). Here followed thirty-seven instances of particular properties, each of which was

declared to be of a particular rateable value, "which is the sum at which it is assessed by the new valuation hereinafter pleaded and referred to." Fifthly, that prior to the 10th day of September, 1863, the date when the rate was made, the Board of Guardians of the Union of Mitford and Launditch, and of which the said parish of Mattishall forms part, had appointed from among themselves a committee for the investigation and supervision of the valuation of properties within such union, under the 25 & 26 Vict. c. 103; that such committee was then proceeding with a new valuation of the properties within the parish liable to be assessed to a poor-rate, and that a valuation or assessment had since been made, whereby many properties in the said parish had been raised from the amounts at which the same were respectively assessed to the rate in question, and whereby other properties had been decreased in value, and that such rates of increase varied from nil to 352 per cent., and of decrease from nil to 64 per cent. Sixthly, exhibited a paper writing marked A, which was a transcript of the church-rate book in six columns, with the addition of a seventh and eighth columns—the seventh column containing the amount at which the several properties were rated under the new valuation, and the eighth column contained the amount per cent. of increase and decrease. Seventhly, exhibited a paper writing marked B, as a transcript of the new valuation of the parish of Mattishall for poor's rate.

The responsive allegation of the plaintiffs, first, took issue on the question of the principal door; secondly, alleged the valuation of 1839 to have been made by competent valuers, and in accordance with the provisions of the 6 & 7 Wm. 4, c. 96, that very little alteration had taken place in value of the several properties in the parish, and that the valuation so made had been carefully revised and corrected from time to time, as occasion required; thirdly, that the valuation made under the provisions of the 25 & 26 Vict. c. 103, was so made by a committee appointed from among the guardians of the Union of Mitford and Launditch, which sat at Gressenhall Union-house, eight miles distant from Mattishall; that no inspection or survey of the properties in the parish was made in order to arrive at the respective values, but that the said committee were guided in their valuation of the

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said properties principally, if not entirely, by the rents actually paid for the same; that the actual rents do not represent the fair annual relative values of the several properties; that the committee, in order to arrive at the rateable values of the properties, made a uniform percentage reduction in all properties of a like description, without considering whether any particular property was in a good or bad state of repair, or what might be the probable annual cost of repairs, insurance, and other expenses attending such property; that a uniform reduction of two per cent. was made on all properties being land, seven and a half per cent. on land and premises, twelve and a half per cent. on houses, thirty per cent. on cottages, and sixty per cent. on mills; that the valuation so made was incorrect and erroneous. Fourthly, denied the allegations of the defendant as to the values of the particular properties enumerated.

On these pleadings the case was heard on *vivâ voce* evidence on the 17th and 18th November.

The Queen's Advocate and *Dr. Swabey* for the churchwardens.

Dr. Deane, Q.C., and *Dr. Tristram*, for the defendant.

The Queen's Advocate urged at the outset that on the face of the pleadings the defendant had no *locus standi*, as he neither averred, nor did it appear, that he himself was injured by the alleged inequality. In addition to the cases cited when this point was before the Court, on the admission of the allegations (1), he referred to *Farlar* v. *Chesterton*. (2) But

DR. LUSHINGTON refused to determine this point till the whole case had been heard.

The Queen's Advocate then stated that he proposed to examine such witnesses as were necessary to prove the libel, then to leave the other side to produce evidence in support of their allegations, reserving to himself the right of calling evidence in reply to the case which might be made by the defendant's witnesses.

Dr. Deane, Q.C., contrà, urged that the plaintiff's whole case should be stated and gone into at once.

(1) See 11 Jur. (N.S.) 471; 12 L. T. Rep. (N.S.) 398, where the Court held that the objection that the defendant was underrated could not be taken on the admission of his allegation.

(2) 2 Moore P.C.C. 330.

DR. LUSHINGTON ruled that the Queen's Advocate was at liberty to pursue the course which he had proposed.

The following witnesses were then examined on the libel:—William Harmer, parish clerk of Mattishall; the Rev. James Du Port, vicar of Mattishall; William Edwards, one of the plaintiffs; William Yull, overseer of Mattishall.

On behalf of the defendant, John Porter Smith, farmer, of Westfield, near East Dereham, a member of the committee of assessment from the passing of the act till April, 1865; Mr. James Gowing, farmer, of Mattishall.

In reply, on behalf of the plaintiff, Mr. Yull was recalled, and the Rev. George Curling Bailey, rector of Shipdham, and vice-chairman of the assessment committee, Mr. Charles Atkins, farmer and valuer, of Cawston, were examined.

Mr. Du Port was recalled, also Mr. Harmer; and Mr. J. Porter Smith was recalled by the Court.

The Court and counsel were furnished with shorthand writers' copies of the evidence so taken, and on the 9th December the case was argued by one counsel on each side, at which time certain documentary evidence relating to the proceedings of the assessment committee, and to certain new valuations, substituted for their original valuations, were put in. The result of the evidence is sufficiently stated in the judgment.

On behalf of the plaintiffs, in addition to the point before raised, of the absence of any injury to the defendant, it was argued that the only proof of any inequality in the church-rate assessment which had been offered was by comparing it with the new valuation under the 25 & 26 Vict. c. 103, but that the plaintiffs had established the unfitness of this assessment as an absolute criterion, first, by shewing that the principle on which it was made, viz., on the rent actually paid, was unsound, and not in accordance with the statute as interpreted by the Court of Queen's Bench, in *Hayward* v. *Overseers of Brinkworth.* (1) Secondly, that the result of that principle was that several valuations made by the committee had been set aside; and that, as regards Mattishall, a new valuation was in actual progress under the 26th section of 25 & 26 Vict. c. 103, and this not on the ground that the total

(1) 10 L. T. Rep. (N.S.) 609.

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rateable value of the parish was put too high in the new assessment, but that it was an unequal assessment between the parties in the parish, which was the very point to be determined in regard to the church rate.

Thirdly. Mr. Du Port's uncontradicted evidence of particular instances of inequality in the new assessment.

On behalf of the defendant it was argued that the churchwardens were bound to shew that the rate was equal before they could call upon the court to enforce it against any parishioner whom they sued. That at best there was no presumption in favour of a rate made on a valuation hardly corrected since 1839; that the valuation left in force for the poor's rate under the new act must be taken as the true valuation of the parish, until it was corrected or set aside; and at all events must be taken as more accurate than the evidence of Mr. Du Port, an unskilled witness, as to its deficiencies or unfairness.

Cur. adv. vult.

Jan. 15th. DR. LUSHINGTON. This is a cause of subtraction of church-rate. The church-rate in question is a rate of 1*d.* in the pound made on the 10th of September, 1863, for the parish of Mattishall, in the county of Norfolk. The defendant, Mr. Jonathan Hatton, resists the payment of 6*s.* 8*d.*, at which sum he was rated upon an assessment of 80*l.* 1*s.* The objections brought against the validity of the rate are two. 1. that the notice given of the rate was insufficient. To be valid, it ought to have been placed on the principal door of the church, which is alleged to be the western door; instead of that, it was placed in the porch of the south door. 2. That the assessment upon which the rate was based is unequal. The first objection may be easily disposed of. It appears that the southern door is as large as any door in the church, and has the widest approach. It is an ancient door, and has always been used as a door; is the door by which funeral and wedding processions enter and leave the church, and is the door which has always been used for the affixing of notices. Such is the testimony of Mr. Harmer, who has been parish clerk for eighteen years; of Mr. Edwards, who has lived in the parish for sixty-five years, and of others, and their testimony is quite uncontradicted.

On the other hand, the western door, if as large as the southern door, and even if more used at present as a means of entrance and exit, has been only recently opened, some five or six years—the steeple end of the church where the door stands having been previously used for the storing of parish coals; and, moreover, it would seem that no notices have ever been affixed to this western door. There seems no ground for supposing the north door to be the principal door. It is clear, then, I think, that the southern door is the principal door of the church; and the fact that the notices were affixed, not to the door itself but on the side panel of the porch to the door is immaterial. The first objection, therefore, falls to the ground. I hold that proper notice was given of the rate.

The second objection raises many difficulties. The assessment which furnished the churchwardens with the valuation, upon which the church-rate was made, was taken from the poor's rate book, being in fact the assessment for the poor's rate immediately preceding. In order to show the inequality of this assessment, the defendant compares it in detail with the subsequent poor's rate assessment made under the Union Assessment Committee Act, 1862. This latter assessment was commenced in August, 1862, that is, before the church-rate was made, but was not completed till March 21, 1864, that is, six months after the church-rate. The comparison of the two assessments, the old and the new, as set forth in exhibit A, shows many variations; variations chiefly of increase upon the old assessment, but many also of decrease. Upon this the defendant contends that the new assessment must be taken to be correct, and, consequently, that the old assessment is unequal and cannot be sustained. It may be convenient here to consider a counter objection suggested by the plaintiffs in reference to this comparison of the two assessments. It appears, upon the defendant's own shewing, that under the new assessment he himself was assessed at 101*l.* 15*s.*, whilst upon the old assessment he was assessed at only 80*l.* 1*s.* The plaintiffs upon this argue that the defendant himself was certainly not aggrieved by the old assessment, and therefore, whether or not that assessment was fair to the whole parish, he, at least, could not be heard to complain of it, or to resist the demand of the plaintiffs. But this argument seems to me not conclusive;

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for the fact that, under the old system, the defendant was assessed at a lower scale than under the new, is no sufficient proof that he could not have been aggrieved by that old assessment; for we have only to suppose some of the other parishioners assessed upon a still lower scale, and then he most certainly would be aggrieved. And even if he had not been aggrieved the question might still be open whether the plaintiffs, seeking the power of the court to enforce a rate, the defendant might not be allowed to prove that the rate is unfair to the community. The practice, so far as I know, has hitherto been for the person resisting a church-rate, to show generally the inequality of the assessment; and a church-rate, as is well known, cannot be amended; it must be maintained as a whole or disallowed as a whole, and unless the rate appears to be a valid rate, how could the court enforce it; could it be valid for one and invalid for another parishioner? However, what would be the result of an attempt to enforce a church-rate which was unequally made, but which by its inequality favoured and not injured the only persons who resisted it, it is not necessary to examine further. It is enough to say that that is not shewn to be the present case, and the Court must hold that the defendant has not debarred himself of the right to show the old assessment to be unequal.

The question then is to what extent is the new assessment a proof of the injustice of the old assessment? The new assessment was, as I have said, made under the Union Assessment Committee Act, 1862; but that Act contains no provision whatever concerning church-rates. It leaves the law in that respect just where it was; and, consequently, this new assessment, like any other poor's rate assessment made before the act of 1862, is only evidence and not necessarily proof, of the accuracy or inaccuracy of the assessment upon which the church-rate was made; and is open to be disputed by either party. *Primâ facie*, however, there is presumption of the superior accuracy of this new assessment. In the first place it is quite recent, completed only six months after the church-rate. It can therefore do justice to any rise or fall in value of the parish property that may have taken place up to the present time.

In the next place, the assessment was made under most, if not all, the precautions provided by the late act. It was made by an assessment committee, appointed by the Board of Guardians of

Mitford and Launditch Union, to which Mattishall belongs, a union containing no less than sixty parishes. The committee had the task of assessing not only the property in Mattishall, but the property throughout the union: its members were duly qualified, according to the act, being guardians *ex officio*, or elected. They commenced operations in August, 1862, and continued to sit for nearly eighteen months, preparing the valuation list, for seven of these months sitting three or four days in the week. They used the power given them by the 13th section of the act, to require overseers, collectors of taxes, and other official persons, to attend and furnish them with returns, &c. Then, when the valuation list had been prepared, it was deposited with the proper parish authorities, and a notice of such deposit was given, and a month was allowed, within which objections were to be made. The Committee held meetings at Gressenhall to hear the objections. "We had plenty of objections," says Mr. Smith, "at the revision when the parties were summoned, and of course we heard what they had to say, and we settled the matter between ourselves then." No formal appeal appears to have been made from Mattishall to the Quarter Sessions, either against the new assessment itself by the overseers of the parish, under the 32nd section of the act of 1862, or against any poor's rate made under that assessment by any parishioners of Mattishall exercising the right of appeal, which existed before the act of 1862, and is expressly recognised by the 22nd section of that act. Upon this valuation list poor's rates have been framed every successive quarter since April, 1864. The fact that this new assessment was made in pursuance of these statutory provisions is certainly *primâ facie* evidence of its accuracy. The defendant seems to have relied upon it as conclusive of its accuracy, and produced no evidence to verify extraneously the results of the new assessment. The plaintiffs, on the other hand, dispute altogether its accuracy, and charge that in the mode of preparing the valuation list an important requirement of the statute was disregarded. It may be convenient to state this requirement at length. The Union Assessment Committee Act, 1862, section 15, provides that "the gross estimated rental for the purpose of the schedule to this act shall be the rent at which the hereditament might reasonably be expected to let from year to

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year, free of all usual tenants' rates and taxes, and tithe commutation rent-charge, if any, provided that nothing herein contained shall repeal or interfere with the provisions contained in section 1 of the said act (6 & 7 Wm. 4, c. 96), defining the net annual value of the hereditaments to be rated." By section 1 of 6 & 7 Wm. 4, c. 96, the net annual value (which corresponds to the rateable value) is defined to be "the rent at which the hereditaments might reasonably be expected to let from year to year, free of all usual tenants' rates and taxes, and tithe commutation rent-charge, if any, and deducting therefrom the probable average annual cost of repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent." The plaintiffs contend that the assessment committee omitted to have any valuation made of the lands by surveyors, or took any step to ascertain the rent at which the various properties "might reasonably be expected to let," but that instead they adopted as the foundation of their assessment the rent actually received. Now what was actually done appears very plainly from the evidence of Mr. Bailey, the rector of Shipdham, who was the vice-chairman of the assessment committee from the commencement, and a constant attendant at its meetings. He distinctly deposes that the question was from the first discussed, as to whether the foundation of the assessment should be the actual rent or the reasonable rent; and that he himself was overruled by the majority, who determined to take the actual rent. Accordingly, to find "the gross estimated rental," the committee took the actual rent, as ascertained by inquiry, or as appearing by schedule A of the property tax returns, and then deducted therefrom tenants' rates and taxes, and tithe commutation rent-charges, if any. Then to find the "rateable value" they made further deductions, to represent the probable average annual cost of repairs, insurance, and other expenses, as follows: land, two per cent.; land and buildings, seven and a half; houses, twelve or twelve and a half; cottages, twenty-five to thirty; mills, fifty. This evidence is confirmed by Mr. Du Port, who says that all that passed between the commissioners and persons who went up from Mattishall or elsewhere to complain of their assessment was this: —*Q.* (By the commissioners.) "What is your rent?"—*A.* "So and so" (being less than the assessment).—Commissioners: "Good

morning." The fact of the actual rent being the basis of the assessment is also admitted by Mr. Smith, one of the witnesses for the assessment, and, indeed, is not in dispute. Now the Court has nothing to do with the question, whether the provisions of the Poor's Rates Act were duly observed; it has only to ascertain whether the assessment made under it was intrinsically accurate, and on that account to be taken as the defendant proposes it should be taken, as adequate proof of the relative value of parish property for the purpose of levying a church-rate. I am of opinion that the actual rent is not a safe test of the relative value of lands. The actual rent of a property may be affected by special circumstances quite independent of its value, *e.g.*, by the character of the landlord, according as he seeks a moderate and sure, or a high and uncertain return; the position of the tenant, who may be willing to give what is called a fancy rent for the property, as adjoining other lands which he owns or occupies; by the special terms of the agreement between the tenant and the landlord, as to what shall be done or paid by them respectively; and by the extent of the property, it being notorious that small holdings generally let proportionately at a higher rate than large ones do.

The plaintiffs shew that under this assessment some of the above-mentioned causes did actually operate to produce inequality. Mr. Du Port gives many examples of lands in the parish of, as he asserts, the same valu , being unequally assessed. It is unnecessary to specify them. In fact, such cases would necessarily be very numerous in Mattishall, from the fact that the parish consists in a considerable degree of small holdings. Mr. Du Port also gives instances of lands being assessed at what are, in his opinion, quite extravagant valuations: exhibit B, Nos. 17, 35, 78, 80. The adoption of the actual rent as the foundation of the assessment seems also to have given rise to general dissatisfaction. "Not two folks liked it in the parish," says Mr. Edwards. "Half the parish went up to Gressenhall to protest," says Mr. Du Port. It is true no formal appeal to quarter sessions was made from Mattishall, either against the assessment or against any rate made under it, but an appeal was made by the parish of Shipdham, which belongs to the same union, and which had been assessed on the same principle. Whether this was an appeal by the overseers

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of Shipdham against the valuation itself, or against a poor's rate (1) made thereupon, does not appear; but the result of that appeal was, according to Mr. Bailey's evidence, the quashing of the rate so far as Shipdham was concerned, on the ground of inequality; and the cause of the inequality was, we are also expressly informed by Mr. Bailey, the vice-chairman of the Assessment Committee, the fact of the actual rent having been taken as the basis of the assessment. This is important, because, but for this statement, the appeal against the assessment by Shipdham might be supposed to have had for its object the equalizing of the poor's rate between Shipdham and other parishes in the same union, and not between the different parishioners of Shipdham itself. Mr. Bailey further states that the door having been thus opened by the Shipdham proceedings, memorials were presented by divers parishes within the union, praying the Assessment Committee immediately to exercise the power vested in them by the 26th section of the act, of making supplementary valuations from time to time. It appears from papers delivered since the hearing of the cause that twelve parishes have made such supplementary valuation lists, which have been received by the Assessment Committee, and approved; that fourteen parishes have been ordered to make new valuations, and have made them; and that five parishes have been ordered to make new valuations, but have not yet sent them in. Amongst these five is Mattishall. The letter from the churchwardens and overseers of Mattishall praying for a new assessment has been produced; it is in the following words:

"Mattishall, 20th February, 1865.

"GENTLEMEN,—We, the undersigned churchwardens and overseers of the poor of the parish of Mattishall, feeling assured that the existing discrepancies and errors in the present valuation list for this parish might be avoided, and the assessment made more satisfactory to the majority of the ratepayers, by the amicable adjustment among themselves, by your permission to make out a new valuation list, which will produce a total gross and rateable

(1) The case was, *Andrews, Appellant, Overseers of Shipdham, Respondents*, heard at the Sessions for the county of Norfolk, in July, 1864. The appeal was against a poor's rate made upon the rateable value of the appellant's property as it appeared in the valuation list.

value equal in amount to the list now in force, and against which so many objections are constantly made, we therefore beg that you will see fit to order a new valuation list accordingly.

"We are, gentlemen, your obedient servants,

"JOHN MANN
"WILLIAM EDWARDS } *Churchwardens.*

"WILLIAM YULL, *Overseer.*

"*To the Union Assessment Committee.*"

The answer received was as follows:—

"Mitford and Launditch Union,
"1, Quebec Road, East Dereham,
"7th March, 1865.

"GENTLEMEN,—In compliance with your request, and in accordance with the provisions of the act of 25 & 26 Vict. c. 103, I am directed by the Union Assessment Committee of this union to order you, with as little delay as possible, to make a new valuation of all the rateable hereditaments in your parish, and a new valuation list in substitution for the present valuation list now in force therein.

"I am, gentlemen, your obedient servant,
"CHARLES WRIGHT, *Clerk to the Committee.*"

In consequence of this letter a committee was formed in Mattishall for the purpose of revising the valuation list, and this committee is still sitting. The above circumstances, I think, account for no formal appeal having been made—at all events, during the present year—and, I think, go far to neutralize any inference that might be drawn from the fact that no formal appeal was made by Mattishall from the beginning. On the whole I cannot come to the conclusion that the new assessment is adequate proof that the old assessment is erroneous. The new assessment not being by law applicable to church-rates, that evidence is like other evidence, open to examination and exception. The new assessment being in a great measure founded on the basis of the actual rent, and not the rent the property might justly yield, is not made according to law, nor is it a just and equal assessment, and therefore, standing alone, is not adequate proof that the old

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assessment is erroneous. I do not lay much stress upon the evidence that in making the new assessment the committee did not always adhere to their own principle. That principle was to take as a basis the actual rent, and to make certain fixed deductions therefrom; and to shew it was not followed Mr. Du Port brings forward instances:

(1). Of the basis being in excess of the actual rent—exhibit B, Nos. 96, 56.

(2). Of the basis being short of the actual rent—exhibit B, Nos. 47, 55, 111, 115.

(3). Of excessive deduction having been made—exhibit B, Nos. 25, 55, 56.

(4). Of no deduction at all having been made—exhibit B, No. 24.

(5). Of simple mistakes—exhibit B, Nos. 18, 21.

This conclusion to which I have come makes it unnecessary for me to examine in detail the variations between the two assessments, as appearing in exhibit A. It may be well, however, to state that that exhibit certainly contains some errors, as Mr. Du Port has pointed out, namely, exhibit A, Nos. 25, 57, 246, 260. Possibly some others also. And it must be remembered that the force of the alleged variations between the two assessments extending in instances of rise in value from nil to 352 per cent., and in instances of fall from nil to 64 per cent., is very much diminished by the consideration of the very small value of the great majority of the holdings; a slight addition or diminution causing a large proportionate difference.

The question then remains whether the old assessment, considered by itself and irrespective of the new one, can be sustained as a just and fair one. The assessment was taken from the book for the poor's rate immediately preceding; but the valuation was made originally in 1839. It is therefore of very ancient date—twenty-four years old; and during that time, it is admitted that it was not much altered. All that seems to have been done was to make an alteration when a new building was made.

Mr. Edwards says: "When there was a house built we went to look at it, and we put them as near as we could."

Mr. Yull says: "If a new house was built the valuation was

altered; and on any new additions to a house there was an alteration; and if there was not there should have been."

But, except in cases such as I have referred to, it is admitted no allowance was made for improvement or deterioration of any farms. Still it appears some change was made in almost every rate. Now, is it manifest that such an assessment was unfair? Let me look to the probability of the case. Certainly twenty-four years is a long time for the property of a parish either to remain unaltered in value, or to rise and fall in value equally throughout its whole extent. On the other hand, Mattishall is a small agricultural parish, in a remote portion of England, twelve miles from Norwich, where the quarter sessions are held, and five from East Dereham Petty Sessions. The population is 975, the number of assessments 261. There is no squire or great proprietors in the parish. "There are a great many little farms," says Mr. Gowing, "a great many live in their own little places, and so on; no very large farms." And again, in answer to the question, what is the average size of the farms about Mattishall, he says, "I can hardly say, there are so many little farms." "*Q.* Any as low as forty acres?—*A.* Yes, some as low as seven. *Q.* Are they indeed farms?—*A.* You may call them little places. There are a great many little places in Mattishall, and a good many farm their own land; at least one or two." There is no evidence whatever of any special disturbing causes having been at work in the parish, as railways, canals, mines, manufactures. There was very little building even; not one new gentleman's house built throughout the whole period. Certainly the total value of the parish property seems to have altered very little. According to the two assessments the annual value rose in the twenty-four years from 4488*l.* to 5222*l.* Then, as to the direct evidence of change of value. The only witness for the defendant is Mr. Gowing. He does not think *house* property has increased, but "he is not able to say much about that." He thinks *cottages* have rather decreased than anything else, and gives as a reason that a great many people have emigrated to towns and to foreign parts. He thinks *land* has increased 50 per cent. since he has been at Mattishall—twenty-four years—but the only example that he gives of this (the example of his own farm), when closely

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examined, does anything but bear out the assertion. Then for the plaintiffs, Mr. Atkins swears that, in his opinion, there is no material difference in the comparative value of property at Mattishall, but a uniform increase has taken place. Mr. Yull says there is not much change, but being pressed on cross-examination says that some lands have decreased, and some perhaps have increased, the difference being shewn by the prices fetched at public auction. Mr. Edwards says some land has improved a little, but he does not think much. He also admits, when pressed, that some rentals have increased and some decreased. Now, if a gross inequality and change of value in Mattishall had been proved to have taken place, of course the plaintiffs could not sustain their case; but on the whole I think the evidence is insufficient to establish that this was so. It must be remembered that this assessment, old as it was, had been the basis for poor's rates up to the time when the church-rate was passed, and the person who seeks to upset an assessment that has been so acted on is bound, in my opinion, to demonstrate its inequality more conclusively than the defendant has done in the present case. In fact he seems to have trusted wholly to the mere production of the new assessment, and not thought it worth while to corroborate that new assessment by direct evidence. The new assessment having wholly failed him, and being his only evidence, his case has failed altogether. For *primâ facie*, the old assessment so long acquiesced in is proof of its fairness. Judgment, therefore, must be for the plaintiffs, with costs.

Judgment for the plaintiffs. (1)

(1) See next case.

BARNES *v.* GRANT.

Church-rate—Inequality—New Assessment—6 & 7 Wm. IV. c. 96—25 & 26 Vict. c. 103.

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Jan. 15.

In making a church-rate the parishioners are not bound to adopt the valuation made by an assessment committee, under the 25 & 26 Vict. c. 103.

Where a church-rate was made upon the basis of an old valuation originally made for the purposes of poor's rate and in accordance with the 6 & 7 Wm. IV. c. 96, and which had been since from time to time corrected, and acted upon and acquiesced in for a great number of years, the Court refused to disturb the rate, merely on the ground that a new valuation, made under the 25 & 26 Vict. c. 103, differed from the old one.

THIS was a suit brought by letters of request from the Consistorial Court of Norwich by the plaintiff, as sole churchwarden of the parish of Kettleburgh, in Suffolk, against the defendant, for subtraction of church-rate. (1)

The libel, as amended, alleged a vestry meeting on the 13th June, 1863, at which a rate of 7*d.* in the pound was duly made, and that all the inhabitants and other ratepayers of the parish, with the exception of the defendant, James Brighton Grant, had paid the rate so made, and that he was duly assessed on various premises held by him in the sum of 1*l.* 13*s.* $5\frac{3}{4}d.$ The defendant's allegation stated:—First, that no valuation had been made of the properties in Kettleburgh since the year 1838 till the valuation made under the 25 & 26 Vict. c. 103; and that in 1846 the parish officers had reduced the valuation of 1838, generally and throughout. Secondly, that the assessment for the church-rate was copied from the assessment which was in existence up to the year 1863, but that such assessment was unequal and unjust, by reason that the rates of reduction, allowed for the difference between the rental or annual value of the several properties mentioned and their value, was not founded on any definite principle, whereby many of the parishioners were favoured at the expense of James

(1) See 11 Jur. (N. S.) 395, where on application to amend the libel the Court held that on sufficient cause being shewn, it may order the amendment of the pleadings at any time before the hearing of the cause.

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B. Grant and other parishioners. Thirdly, that certain properties were let to the occupiers thereof at annual sums greatly exceeding the amounts set down in the church assessment, as the rental or annual value thereof respectively; and that the entries thereof under the head "Rental or annual value of property," were generally and throughout grossly inaccurate, and entirely disproportionate to the real rental or annual value of the properties, against which the same were placed respectively; and that the amount at which the properties were assessed therein as the rateable value, under the head "Amount at which the property is assessed," were less than the sums at which the same would reasonably let, after deducting all usual tenants' rates, and less tithe commutation rent-charges, and the annual cost of repairs, insurance, and other expenses necessary to maintain them in a state to command such rent. Here followed a list of nineteen properties, said respectively to be assessed at sums less than their true rateable value, such true value being that ascertained by the said valuation more particularly hereinafter referred to. Fourthly, that several other of the assessments to the church-rate were made upon the rack rental, or annual value, or at nearly the rack rental, or at sums exceeding the rack rental of the lands, &c., or the rentals actually paid for the same, or the sums at which the same would reasonably let, &c. Here followed twenty-two instances of properties stated to be assessed at sums respectively above their real value, such real value being that ascertained by the new valuation more particularly hereinafter referred to. Fifthly, that before the making of the church-rate the board of guardians of the Manor of Plomesgate, of which Kettleburgh forms part, had appointed a committee under the 25 & 26 Vict. c. 103; that such committee was then proceeding with a new valuation of properties within the parish, liable to poor's-rate; that such valuation had since been completed, whereby many properties in the parish had been raised from the amounts at which they were assessed to the church-rate; that the defendant's brewery and stables, assessed in the church-rate at the sum of 27*l.*, were assessed at the same sum under the new valuation; that the defendant's malting assessed to the church-rate at 23*l.* was reduced by the new valuation to 21*l.* 15*s.*; and the house in his

occupation remained at the same value, 6*l.* in both assessments; that other properties had been raised in very large proportions under the new valuations. Sixthly and seventhly, exhibited paper writings, A & B, to the same purport *mutatis mutandis*, as the similar papers in *Edwards & Mann* v. *Hatton*. (2) Ninthly, that several persons liable to be rated in respect of cottages and other premises were altogether omitted, though assessed to the poor's rate. Tenthly, and that certain others were assessed at 3*d.* in the pound instead of 7*d.*

The responsive allegation on behalf of the plaintiff stated:—First, that in 1839 a valuation of all the properties in the parish was made for the purposes of poor-rate, by competent valuers, in accordance with the 6 & 7 Wm. 4 c. 96; that very little alteration had taken place in the values of the several properties; and that the valuation so made had been carefully revised and corrected from time to time. Secondly, that the valuation of the parish made under the 25 & 26 Vict. c. 103, was made by a committee appointed from among the board of guardians of the union, which sat at Wickham Market, four miles from Kettleburgh; that the committee made no survey or inspection of the properties of the parish, but were guided in their valuation principally by the rent actually paid for the same; that the rents actually paid do not represent the fair annual relative values of the properties; that to arrive at the rateable values the committee, in the case of lands and farmhouses, made a uniform per-centage reduction from the actual rent, and thereby did not arrive at a fair and equal assessment; that the whole valuation so made was incorrect and erroneous. Thirdly and fourthly, traversed the particular statement and value contained in the defendant's allegations. Fifthly, alleged that the houses, premises, and cottages referred to in the tenth article of the allegations were respectively of very small value, and occupied by poor people; that the rates were paid by the several owners; and that the name of one of the tenants of each owner is for convenience inserted in the church-rate as the occupier; that an abatement of one-half of the rate assessed upon other properties had for years been made upon the properties referred to.

(2) Ante p. 21.

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On the 18th November witnesses were examined in court on these pleadings.

Dr. Deane, Q.C, and *Dr. Swabey*, for the churchwarden.

Dr. Tristram, and *E. C. Clarkson*, for the defendant.

The result of the evidence given is sufficiently stated in the judgment.

Cur. adv. vult.

Jan. 15th, DR. LUSHINGTON. This is a cause of subtraction of church-rates. The plaintiff is the sole churchwarden of Kettleburgh, in Suffolk. The defendant is a Mr. Grant, maltster. The rate in question is a rate of 7*d.* in the pound, made on June 13th, 1863, for the year from Easter, 1863, to Easter, 1864. The sums demanded of Mr. Grant amount in all to 1*l.* 13*s.* 5¾*d.* There is no dispute that in form the rate was properly made, but the ground of impeachment is that the assessment on which the rate was based was unequal and unjust. It appears from the evidence of Mr. Barnes, the churchwarden, that the valuation which was the foundation of the church-rate, was made originally in 1839: and that in 1849 it underwent a uniform reduction throughout, at the rate of nine per cent., occasioning a total reduction, amounting to 184*l.* 17*s.* 6*d.* per annum; and that from time to time onwards it was practically revised every six months. Mr. Turner, the incumbent, states, "Since I have been in the habit of attending the meetings, and been the chairman of the meetings, we have always, I think, about every six months or thereabouts, gone over all the property of the parish, and if any property was either deteriorated in value, or increased in value, it was always considered and assessed, and an alteration made." Mr. Barnes gives evidence to the same effect: "Whenever any fresh property arose (which has been very trifling indeed), whenever anything, such as a small house, or any addition whatever has been made to property, it has always been brought before the vestry, and rectifications, either additions or diminutions, made by a full meeting." And again; "each rate was revised every six months, and the meetings were attended by all the principal inhabitants, and if anything had improved in the parish, there is no doubt that we are sufficiently jealous of one another, that we do not like to favour one another."

It is true that, so far as land is concerned, no account was taken of any change of value that might have arisen, but then Mr. Barnes says, as to the increase of the value of land, "it has been so imperceptible, that really you can hardly see it without putting your spectacles on." And Mr. Turner, who has been rector since 1840, states that it is the general case of the parish. That land remains pretty much of the same value now, taking one piece with another, as it was twenty-five years ago. He also states that the rentals have not varied very much in the last twenty-five years. Elsewhere he says: "There has been very little buying or selling of land in the parish, but upon the whole, I should say that the land has looked upwards. Now, perhaps, it is stationary, for the present state of affairs may probably turn the scale the other way." This evidence is not substantially contradicted. I should state that Kettleburgh is a small agricultural parish, extending over 1400 acres; almost entirely of arable land, with little or no house property, and with a population of no more than 350. It is situated also in a purely agricultural district, two miles from Framlingham, eight from Woodbridge; and so far as appears from the evidence, there are no special circumstances, such as mills, railways, canals, or manufactures likely to cause any great or unequal increase in the value of the parish property. The result of the evidence, then, is this; first, that the valuation upon which the rate was made was an old one; secondly, that no special necessity had arisen for making a new general valuation; thirdly, that the old valuation had been revised every six months in full vestry, and corrected in any particular that seemed to require correction; fourthly, that this old valuation so revised was the basis of the poor-rate so late as April, 1863. The defendant has produced no direct evidence, shewing by actual instances that this old valuation so revised was incorrect, for the case of Mr. Turner the rector and a landed proprietor, is quite exceptional, and I cannot attach much importance to the instance of the Dennington trustees' land; and with regard to the Chequers Inn, held by Mr. Stockings, the less said about that the better for the defendant. If then the case remained here, there would not be the slightest ground for questioning the equality of the assessment. But the defendant would prove the inaccuracy of this old assessment, by contrasting it in detail with a new assess-

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ment for the poor's rate, made under the Union Assessment Committee Act, 1862. The result of this comparison shews numerous differences between the two assessments, the variations being from nil to 275 per cent. of increase, and from nil to 56 of decrease. The defendant contends that the new assessment being the most modern, and having been made according to the provisions of the statute, must be taken to be correct. Now in my judgment on the previous case (1), I have already stated that a poor's rate assessment not by law, or necessarily, a conclusive proof of the equality of a church rate assessment: it is simply evidence open to exception by either party, and entitled to no more weight than that which upon consideration of all the circumstances it may seem to deserve. I need therefore pursue the subject no further on the present occasion. In the same judgment I have also at some length pointed out how that a presumption must always exist in favour of the accuracy of a valuation made under the Union Assessment Committee Act, 1862, by reason of the statutory safeguards by which the process of making such valuation is surrounded. It is unnecessary here to make any repetition, nor is there any necessity for me to consider the objection made by the plaintiff to the defendant, that the defendant is debarred from complaining of this church-rate, by reason that the defendant, according to his own shewing, was assessed lower under the old assessment on which the church-rate was based than he was under the new assessment. A similar objection was raised in the present case, and disallowed. In two respects the defendant in this case stands upon a better footing than the defendant in the former case. 1st. In making the new assessment, the provisions of the Union Assessment Committee Act, 1862, seem to have been carefully complied with. The basis taken for estimating the annual value was not the actual rent, but the rent at which the properties might reasonably let. The course taken is thus described by Mr. Turner:—"The committee, which consisted of twelve, took into consideration if it was land, the staple of the land, the locality of the property, whether it was situated by the side of a good road or not; and they also took into consideration how far it was from the market, whether it had good buildings upon it, and everything of the same descrip-

(1) *Edwards and Mann* v. *Hatton*, ante p. 21.

tion which could possibly affect the letting of a farm; and having done all that, they set their valuation accordingly, and that rule was applied to all that came under our notice." The assessment seems to have been satisfactory to all parties; there has been no appeal whatever from Kettleburgh to the Quarter Sessions, and Mr. Turner himself admits that he is perfectly satisfied with the new assessment. 2ndly. The new valuation list under the Union Assessment Committee Act, 1862, though not acted upon for the poor's rate of Kettleburgh till after the making of this church-rate, was in existence at the time the church-rate was made, and was available for the church-rate, if the vestry had thought proper to use it for that purpose. This appears from the dates:—

New assessment valuation sent to overseers .	Dec. 22, 1862.
Do. Supplemental list . .	May 4, 1863.
Poor's rate on old assessment . . .	April —, 1863.
Church-rate on old assessment . . .	June 13, 1863.
First poor's rate on new assessment . .	Michaelm. 1863.
New assessment, new valuation list . .	June 6, 1864.

The supplemental list differed only from the first valuation list in respect of tithe, and the new valuation list differed from the supplemental list in very few particulars, of which the rectification of Mr. Stocking's assessment was the only notable one. These circumstances create a presumption in favour of the accuracy of the new assessment, and I wish to do full justice to them. They increase the difficulty of the plaintiff in supporting the accuracy of the old assessment. But it must be remembered that the plaintiff, at the time of making the church-rate, had no reason for suspecting the accuracy of the old assessment, beyond the fact that it differed from the new. The old assessment had been long tried, and never disputed; the new assessment had not been tried, and it was in no way legally incumbent upon the parish to adopt it for the purpose of making the church-rate. No direct evidence has been given of the inaccuracy of the old assessment. The defendant, in effect, simply produces the new assessment, shews that it differs from the old, and straightway asks the Court to disallow the rate. I do not think that this is sufficient evidence to warrant me in pronouncing against the validity of a rate founded on a valuation carefully revised every six months, and on

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which valuation, up to the time of making this church-rate, all poor's rates, all church-rates, had been made and not disputed. It may be that the new valuation is the more correct, but that the two valuations differ is not adequate evidence to prove that the old valuation, revised as it was, is substantially erroneous, and I have no other proof—mere difference of opinion between three sets of valuers is of daily occurrence, and alone, without other evidence, will not favour the superiority of either. But the Court must decline to disturb a rate unless it receives conclusive proof that the assessment was unequal, and the mere production of another assessment cannot be accepted as such conclusive proof. Judgment must therefore be for the plaintiff, and with costs.

Judgment for the plaintiff. (1)

(1) See preceding case.

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Feb. 20.

IN THE HIGH COURT OF ADMIRALTY.

THE FLORA. De Laca.

Collision—Arrest of vessel—Liability of cargo—Release on bail—Re-arrest.

A plaintiff in a cause of collision suing ship and freight may always arrest the cargo for freight, and if freight be not due will not therefore incur costs and damages, but on affidavit that no freight is due, and that he is ready to carry on to destination, the defendant, owner of the ship sued, is entitled to have the cargo released.

After property arrested has been released on bail the plaintiff is not entitled to re-arrest it, although the defendant has consented to have the amount of the action increased.

The plaintiff having re-arrested in such case, the Court made an equitable order, allowing the re-arrest to stand, but cancelling the bail-bond, and directing that the value of the ship (which had been repaired since the release) should be estimated at the time of the first arrest.

COLLISION. On the 16th of September, 1865, the *Flora*, a Spanish barque, bound from Havana to Hamburg direct, with a cargo of tobacco, came into collision with the *Allan* in the British Channel, and put into Plymouth for repairs. On the next day, the 17th, the *Flora* and her cargo were arrested in a cause of damage in the sum of 1000*l.*, at the suit of the owners of the *Allan*. Bail was given, and the *Flora* and her cargo were released, and the *Flora* was repaired at an expense of about 400*l.* On the 12th of December, the plaintiffs increased the amount of the action to 3000*l.*, and re-arrested the *Flora* and her cargo. No further bail was given.

Jan. 16. *Vernon Lushington* moved the Court to set aside the re-arrest, with costs and damages. R. 54. After release on bail, there is no power to re-arrest without leave of the Court: The *Kalamazoo* (1); the *Temiscouata* (2); the *Wild Ranger*. (3) The plaintiffs have no right to keep the cargo under arrest where there is no freight proved to be due.

Brett, Q.C., and *E. C. Clarkson*, contrà. It was in the discretion of the Registrar to issue the second warrant.

(1) 15 Jur. 885. (2) 2 Sp. 208. (3) Br. & Lush. 84.

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DR. LUSHINGTON said it was the practice to arrest the cargo whether freight was due or not, and held the re-arrest to be valid, but made an order that the bail-bond should be cancelled, and that, as the owners of the *Flora* had expended 400*l.* in repairs, the value of the ship should be limited to her value at the time of the first arrest.

Feb. 13. *Milward, Q.C.*, and *Vernon Lushington*, in support of a motion for a supersedeas of the arrest of the cargo. Cargo may be arrested for freight due, but not otherwise. The *Victor* (1), R. 49., "Cargo arrested for freight only," &c. No freight *pro rata* is considered due, even in prize cases, where the captors carry in neutral cargo, but not to destination. The *Diana* (2), *Vrow Anna Catherina.* (3) It is immaterial that the defendants, the owners of the ship, have an interest in the cargo to carry on; they are the agents for the cargo to carry on, and the owners of the cargo will suffer if it is kept under arrest; the defendants' interest is not a thing attachable or liable to be taken in execution. The owners of the cargo have a right here under contract, which the Court of Admiralty cannot supersede: *Cargo* ex *Galam.* (4) Cases that have gone by consent are no authority. *The Rendsberg.* (5)

Brett, Q.C., and *E. C. Clarkson*, contrà. The owners of the cargo are not before the Court. This application is by the owners of the ship. We claim to attach all that they have in cargo, viz., their lien on cargo to carry on. If the owners of the cargo suffer, it cannot be helped. It is "freight due or to grow due." 17 & 18 Vict. c. 104, s. 504.

Milward, Q.C., replied.

Cur. adv. vult.

Feb. 20. DR. LUSHINGTON delivered judgment. This is a motion to order a supersedeas of the arrest of the cargo late on board the *Flora*, and is made under the following circumstances:—In September, 1865, the *Flora*, a Spanish barque, then lying at Havana, was chartered for a voyage from Havana to Ham-

(1) Lush. 72.
(2) 5 C. Rob. 71.
(3) 6 C. Rob. 271.
(4) 2 Moo. P. C. (N. S.) 216.
(5) 6 C. Rob. 163.

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burg direct for the sum of 819*l.* The charterer shipped a cargo of tobacco and cigars, at a gross freight, as per bills of lading, of 996*l.* 2*s.* 10*d.*, the goods being made deliverable at Hamburg, or in that port to which the voyage should be considered as accomplished. On the 16th of November a collision took place between the *Flora* and the *Allan* in the British Channel. The *Flora* put into Plymouth for repairs, and on the next day, the 17th, the owners of the *Allan* instituted a cause of damage against the *Flora* in the sum of 1000*l.*, and caused the *Flora* and her cargo to be arrested. Shortly afterwards, however, they were both released upon the owners of the *Flora* giving bail; the cargo was discharged into a warehouse, and the *Flora* repaired at an expense of about 400*l.* On the 12th of December the plaintiffs increased the amount of the action to 3000*l.*, and on the 20th caused the *Flora* and her cargo to be re-arrested, and, as no further bail has been given, the same are still under arrest. On the 16th day of January, in the present year, the Court ordered the original bail-bond to be cancelled; and, on the ground that the owners of the *Flora* had been induced to spend 400*l.* in repairs upon her by the conduct of the plaintiffs in originally naming 1000*l.* as the amount of the action, the Court further declared that the value of the vessel for which the defendants were liable should be her value estimated at the date of her first arrest, and at the same time application was made to the Court to release the cargo; but this was refused by the Court, and all questions as to freight in respect of the cargo were reserved. On the 1st of February the case came on for hearing, and the *Flora* was pronounced to have been solely to blame for the collision in question; and the Court thereupon condemned the *Flora* and her freight, and her owners, the defendants, in damages and costs. The defendants now seek to have their cargo released, on the ground that no freight is now due. The destination of the goods, they insist, was Hamburg. The owners refuse to accept them here, or at Plymouth, or elsewhere than Hamburg, and, until the goods are delivered at Hamburg, no freight is due. Then, how stands the case? It is beyond all question that the cargo on board a ship which does damage to another ship in collision is in no respect responsible for the damage. It is equally clear that the freight

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due, the property of the owners of the ship doing the damage is attachable to make good that damage; and, in ordinary cases, the cargo is arrested for the purpose of making the owners of the cargo, who at that time owe the freight to the shipowners, pay into court to answer the damage which the latter are bound to make good. But the cargo is liable to arrest for no other purpose whatever. The owners of the cargo are in no respect to blame for the *delictus* of the ship *qua* owners of the cargo. They have no right of interference or control over the conduct of the ship; and, therefore, to make them in any way responsible, would be against the first principles of justice. Then, as the only right against the cargo is for freight then due, the only inquiry is, whether any freight is actually due; and as the cargo was to be delivered at Hamburg, and has been carried to Plymouth only, beyond all doubt, according to the charter and bill of lading, no freight is due. It is true that the master, as the agent of the owners, may tranship the cargo and carry it on to the port of destination, and so earn the freight; but this right, acquired by contract, even if it had been asked for, which it has not, could not by the collision have been transferred to the party damnified thereby. Under the circumstances the Court must release the cargo, but without costs.

Application was made for leave to appeal, but was refused.

~~Cur. adv. vult.~~

Proctor for plaintiffs: *Stokes.*

Proctors for defendants: *Tebbs & Sons.*

THE FLEUR DE LIS. TAYLOR. 1866 Jan. 30.

Master's wages—Costs.

A master suing for wages and disbursements is bound to furnish accounts before bringing his suit; if he do not, he will not be entitled to his costs.

THIS was a cause instituted by Donald Taylor the Master of the *Fleur de Lis*, against that vessel and her owners for his wages and disbursements. The plaintiff claimed a sum of 774*l.* 19*s.* 6*d.*, and it being a matter of account, was referred to the registrar, who made an award of 476*l.* 4*s.* 1*d.*, and in his report expressed the following opinion: "Seeing that the master's claim amounted to 774*l.* 19*s.* 6*d.*, and that only 476*l.* 4*s.* 1*d.*, has been allowed to him, that on the other hand the owners sought to strike off therefrom the sum of 770*l.* 16*s.* 9*d.*, of which only 298*l.* 15*s.* 5*d.*, was allowed against the master, I am of opinion that each party should be left to pay their own costs of the reference."

Butt, moved on the part of the master, that the defendants should be ordered to pay the costs of the cause.

Dr. Deane, Q.C., for the owners, opposed the motion on the ground that no accounts had been furnished before action.

DR. LUSHINGTON. The master was bound by practice and justice to furnish accounts before bringing his suit: he might have had the amount claimed without suit, he is therefore not entitled to his costs. I make no order as to the costs of this motion.

Proctors for plaintiff: *Clarkson, Sons & Cooper.*

Proctor for defendants: *Rothery.*

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Feb. 6.

THE CARGO ex VENUS.

Salvage—Appraisement.

An appraisement made by the marshall of the court will be held conclusive as to the value of the property salved.

THIS was a salvage suit instituted on behalf of the masters owners, and crews of the luggers *Enterprise*, *Eclipse*, *Unity*, *Secret*, *Alert*, and *Ocean*, of the cutter *Fear Not*, and of the lifeboat *Friend of All Nations*, against the cargo (including certain Government stores, but which were released by consent of the plaintiffs' proctor) lately laden on board the brig *Venus*, for salvage services rendered on the 10th of November, 1865, off the *Tongue* lightship.

On the 13th of December the plaintiffs' proctor filed a commission of appraisement, with an inventory of the cargo annexed; the value certified by the appraisers appointed by the Marshall being 1906*l.* 7*s.* 6*d.*

On the 1st of March an affidavit was filed on the part of the defendants, the owners, stating that the cargo had been sold, and realized 1295*l.*, from which a sum of about 272*l.* was to be deducted for various expenses.

Dr. Deane, Q.C., and *E. C. Clarkson*, for the plaintiffs, submitted that the appraisement ought to be held conclusive as to the value.

Vernon Lushington, for the defendants, contended that the true test of the value of the cargo was the sum actually realized by its sale.

DR. LUSHINGTON. It would, in my opinion, unless under extraordinary circumstances, be imprudent on the part of the Court to allow an appraisement made under its authority to be departed from. In the first place, an appraisement made by the authority of this Court is made with great care and perfect impartiality, and is always considered to be a fixed sum, unless it is objected to on particularly strong grounds at the moment it is brought in. But an appraisement might be attempted to be

barred in both ways—by one it might be attempted to be said the appraisement is too high, and by the other it is too low; and great delay and expense would be incurred if the Court encouraged proceedings of this kind. I cannot do so. I must adhere to the appraisement. Respecting the services, the Court cannot forget that there were employed in rendering them no less than 104 hands: that the tonnage of the vessels engaged was considerable, and the value of those vessels very large, viz., 2950*l.* I shall give, taking the value of the property salved at 1906*l.* 7*s.* 6*d.*, one-third, and costs.

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THE CARGO *ex* VENUS.

Proctors for plaintiffs: *Lawrie & Keen.*
Solicitor for defendants: *F. W. Hilbery.*

THE CORNELIA HENRIETTA. CASSELS.

Mar. 13.

Bottomry Bond—Payment by bondholders of wages, &c., of foreign seamen—Repayment to bondholders out of proceeds of sale of ship.

The Court will not, unless upon application being made to it, sanction the repayment of wages, &c., to bondholders out of the proceeds of the sale of a ship.

THE *Cornelia Henrietta*, of Ramsgate, in the course of a voyage from Demerara to London, was forced by distress to put into the port of Martinique in December, 1864. The master being without funds, gave a bottomry-bond to Lloyd's agent there, in August, 1865, on the ship, freight, and cargo, in the sum of 2290*l.* 12*s.* The greater part of the crew having died of yellow fever, the captain obtained from the Governor of Martinique twenty men, on the express terms that on their arrival in England, five of them should be sent to Havre, and the other fifteen back to Martinique, at the ship's expense. The owners of the vessel having become bankrupt, she was, on her arrival in England, arrested at the suit of the holder of the bottomry-bond, who, at the request of the French consul, and after the suit had been instituted, paid for the wages and return-passages of the foreign seamen the sum of 526*l.* 19*s.*

Potter, on behalf of the bondholder, moved that the bond

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THE CORNELIA HENRIETTA.

should be pronounced valid, and that the sums paid for seamen's wages, &c., should be repaid out of the proceeds of the ship, and submitted that since by these payments the expense of a separate suit for seamen's wages, &c., had been saved, the parties affected by the bond could not object.

Dr. Deane, Q.C., for the owners of the cargo, said he should not oppose the application, as the parties had agreed to abide by the decision of the court.

DR. LUSHINGTON. Undoubtedly there has been an irregularity in this case. It has occurred before, and it is not the first time in which the Court has sanctioned the payment of money by way of wages to the parties without that consent which ought to have been had upon application to the Court. Looking at all the circumstances of the case, I think I ought not to withdraw my late approbation of what has been done. I think I ought to make the order that the party shall be recouped this sum of 526*l.* 19*s.*, which has been disbursed; but I wish most expressly to declare that this is a practice I cannot in future sanction, and when a ship is in distress, if I am desired, as I constantly am, to pay certain wages in order to get rid of the expense of keeping the men, or for any other purpose, it is only necessary to come to this Court without the institution of any suit whatever, whoever may have instituted the suit, and whatever condition it may be in, to have the sanction of the Court for payment of the wages, and the Court will never refuse in such a case. I grant this motion now, but if in future times an attempt is made after the warning that has been given, the parties will do it at their peril.

Proctors for plaintiff: *Waltons & Bubb.*
Proctors for defendants: *Deacon, Son, & Rogers.*

THE CATHERINA MARIA.

1866
March 26.

Collision—Evidence.

In a cause of collision, the books, containing the entries made by the coastguard, and sent to the coastguard office, are admissible in evidence to prove the state of wind and weather at the time of the collision, without calling the person who made the entries.

THIS was a cause of damage brought by the owner of the Austrian brig *Amalia* against the *Catherina Maria*, in respect of a collision which occurred off Ilfracombe on the 28th of January last.

Dr. Deane, Q.C., and *E. C. Clarkson*, for the plaintiff.

The Queen's Advocate and *Dr. Tristram*, for the defendants, proposed to put in for the purpose of shewing the state of the wind and weather the returns sent up by the coastguard.

Dr. Deane, Q.C., objected unless the person who made the entries was produced.

DR. LUSHINGTON. I shall not refuse to receive this evidence if the returns are proved to be the original entries. It would be extremely inconvenient to produce the person making the entries on all occasions.

Mr. Sharp, from the Coastguard office in Spring Gardens, then produced the book containing the entries in question, and stated that such a book was kept and sent up by the coastguard monthly.

Evidence admitted.

Proctors for plaintiff: *Toller & Sons.*

Proctors for defendants: *Fielder & Sumner.*

1866
April 27.

THE CANOVA. BROWN.

Salvage—Agreement to tow—Facts withheld.

The owners and crew of a tug sued for salvage services, alleging that an agreement entered into for towage service was invalid, by reason of the fact of the illness of a great part of the crew of the vessel salved having been withheld. No danger to property being proved:—

Held, that there was no salvage service; and the Court pronounced for the agreement with costs.

THIS was a cause of salvage instituted by the owners and crew of the steam-tug *Tiger*, for services rendered to the *Canova*. The petition alleged (inter alia)—That on the morning of the 13th of October, 1865, the *Tiger* left the Mersey and proceeded to sea in search of inward-bound vessels; at about nine a.m., when off Little Orme's Head, those on board the *Tiger* saw a vessel (which afterwards proved to be the *Canova*) lying to an anchor in Rhudlan Patches, and about three or four miles from the shore. The wind at that time was blowing strong from the north east, and there was a heavy sea. The *Canova* was riding by her port anchor, head to wind. The *Tiger* proceeded to her and rounded up on her port side, and the master of the *Tiger* hailed her and asked if she wanted a tug. The master of the *Canova*, in answer, said he did, and after some bargaining between the two masters it was agreed that the *Tiger* should tow the *Canova* up into the Mersey for 25*l*. The *Tiger* accordingly went ahead of the *Canova* and took her hawser and towed her to her anchor, and the crew of the *Canova* commenced heaving in her chain, but were very slow about doing it. The *Tiger* kept easing the ship on to her anchor for nearly two hours, at the expiration of which time the crew of the *Canova* had not succeeded in getting in more than fifteen fathoms of chain, when the ship struck the ground heavily aft. The pilot of the *Canova* immediately called out to the *Tiger* to go ahead full speed, and the master of the *Tiger* immediately ordered her to go ahead full speed, but whilst giving such order the ship again struck aft very heavily. The master of the *Tiger* called out to the pilot of the *Canova* to slip his chain, and pointed to her sails, which were hanging loose. The pilot replied:

"All right, go ahead full speed," and immediately afterwards the chain was slipped. The tug towed ahead full speed, but the *Canova* continued to bump heavily for a considerable time before the tug succeeded in towing her clear of the sand; ultimately the *Tiger* proceeded with her for Liverpool, and safely docked her in the Birkenhead Dock. The master and crew of the *Tiger* subsequently discovered that the crew of the *Canova* had for some time been suffering from scurvy and other complaints; that thirteen of them were totally incapable of doing their duty, and that eight only of her crew, including a boy, were able to work, and these eight were all ill; that her crew had for ten days been short of food; that at the time when she was found by the tug the eight of her crew who were able to work had been at work for forty-eight hours, and were completely fagged out, and that the *Canova* had been compelled to let go her anchor in consequence of her having missed stays owing to her crew being unable to work her, and that the *Canova* was altogether unable to get under way without assistance. The state and condition of the crew of the *Canova* and the several facts and circumstances set out in the last preceding article of this petition were improperly concealed by the master and those on board the *Canova* from the knowledge of the master of the *Tiger*, who, but for such concealment, would not have made the said agreement.

The defendants by their answer took issue upon the statements contained in the petition, and alleged that at the time when the agreement with the *Tiger* was made some of the *Canova's* crew were sick, but there were sufficient hands on board to weigh the anchor without difficulty, and navigate the ship to Liverpool. The agreement was made entirely in good faith and without concealment of any material fact, and the said agreement was binding upon the parties; and that in performance of the service the *Tiger* did not incur any risk whatever, and did not perform any duty which was not included in the original agreement, except in docking the *Canova*, which was an ordinary towage service.

The defendants had paid the sum agreed, 25*l.*, into court.

Evidence having been taken vivâ voce,

Dr. Deane, Q.C., and *E. C. Clarkson*, for the plaintiffs. When a

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vessel makes an agreement with a tug she is bound to disclose the real state of affairs. The captain admits that if he had disclosed the fact of thirteen of his crew being laid up with the scurvy the tug would not have made the bargain. The bargain is therefore not good, for it was not made in good faith.

Milward, Q.C., and *Vernon Lushington*, for the defendants. Unless fraud be shewn, which is not even suggested here, there can be no reason to vitiate the contract merely because every fact has not been mentioned, and to convert this case into a case of salvage.

Dr. Deane, Q.C., in reply. Everything material ought to be told; the illness of the crew was material, because if the crew had been in good condition the towage service would not have been required.

DR. LUSHINGTON, in his address to the Trinity Masters, said:— The main question in this case is, whether this agreement, admitted to have been made, ought to be set aside, because certain circumstances were kept back which now appear. If, though unintentionally, there was a concealment of a fact so material that it ought to invalidate the agreement, I should not enforce it. We must consider whether the owners of the tug were injured in the performance of their task by the withholding of certain facts; whether if more time were taken up than should have been, the plaintiffs would be entitled to more than their bargain. I think neither of the parties to this suit believed that the vessel was in danger, because I consider if the tug had contemplated danger she would have demanded heavier terms for the service. If you should be of opinion that there was no danger to this property, I could not say it was a salvage service.

The Court and Trinity Masters retired for consultation. On their return,

DR. LUSHINGTON said: We are all of opinion that there was no salvage service whatever in this case, and that none of the circumstances which occurred ought to induce the Court to set aside the agreement. I pronounce for the tender, with costs.

Proctor for plaintiffs: *Ayrton.*

Proctors for defendants: *Toller & Sons.*

THE PAUL.

1866
Feb. 13.

Salvage—Costs of appraisement.

Salvors are entitled to the costs of a commission of appraisement where there is a substantial difference between the appraised value and that stated by the defendants.

THIS was a cause of salvage against the brig *Paul* and her cargo, for services rendered in September, 1865, to that vessel by the *Behera*, a screw steamer belonging to the Anglo-Egyptian Steam Navigation Company.

The defendants filed an affidavit, alleging that the cargo consisted of wool, partially damaged, of the value of 7479*l.* 3*s.* 2*d.* The plaintiffs being dissatisfied with that estimate issued a commission of appraisement, under which the cargo was valued at 9727*l.* 10*s.*

The Queen's Advocate and *The Admiralty Advocate* moved the Court to condemn the plaintiffs in the costs of the appraisement: citing *The Commodore.* (1)

Brett, Q.C., and *Butt*, for the plaintiffs, opposed the motion, and asked that the defendants should be condemned in costs. The *Commodore* (1) is clearly distinguishable; in that case the difference between the estimated and the appraised value was only 15*l*: *The Persian.* (2)

DR. LUSHINGTON. I am of opinion that the necessity for this appraisement has been shewn by the result. As a general rule, the defendants are called upon to state the value of their property, and if the plaintiffs are dissatisfied with the estimate, they may obtain a commission of appraisement, and if it be thereby proved that the defendants have not stated the true value, the plaintiffs are entitled to the costs of the appraisement. This is the general, though I by no means say it is the universal, rule; but in this case there is such a substantial difference between the two estimates, that the plaintiffs are clearly entitled to the costs of the appraisement.

Proctors for plaintiffs: *Pritchard & Sons.*

Proctors for defendants: *Dyke & Stokes.*

(1) 1 Spinks' Eccl. & Adm. 175; notis. (2) 1 W. Rob. 327.

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May 1.

THE PHANTOM. HURRELL.

Sc 12 Jur 1st. 529

Salvage—Appeal from award of justices—Invalid agreement.

An agreement for a sum of 8*s.* 6*d.*, as a reward for salvage services, set aside as futile, where it appeared that there was real danger incurred by the salvors in rendering the service.

THIS was an appeal from the award of two justices at Lowestoft on a claim for salvage service rendered to the smack *Phantom*.

On the 11th of January last, the smack was one of a great many small vessels which had entered the harbour of Lowestoft about the same time to take refuge from a gale from the N.N.E. The appellants, seven beachmen of Lowestoft, were engaged by the master of the *Phantom* to haul her from the south to the north side of the harbour to avoid coming in contact with other vessels rushing in. While the appellants were rendering this service, a brig entering the harbour came into collision with the *Phantom*, and they incurred great risk from the falling masts and spars. After about two hours labour, the salvors succeeded in heaving the smack over to the north pier.

It was alleged on the part of the respondent, but denied by the appellants, that there was an agreement to perform the service for 8*s.* 6*d.* The value of the *Phantom* was about 700*l.* The evidence given before the magistrates is sufficiently alluded to in the judgment.

The magistrates' decision was:—"We think this is not a case of salvage at all; there is not one single ingredient of salvage in it. The smack was not in a state of danger; she was in collision with another vessel, it is true, but that has nothing to do with danger—nothing whatever. There was no great risk in what you did, and therefore we dismiss the case altogether, the applicants paying the court fees." From this decision the salvors appealed.

Vernon Lushington, for the appellants.
E. C. Clarkson, for the respondent.

Dr. LUSHINGTON, in giving judgment, said: I have nothing to do with the constitution of the tribunal before which the case was

originally brought. The legislature, in their wisdom, thought fit to establish it, and to give jurisdiction to magistrates on salvage, and I presume always they do their best to discharge their duty; and I must go further, and say that it must never be the disposition of this Court to reverse the judgment of the Court below unless satisfied it is erroneous; but, at the same time, if satisfied it is erroneous, it should never scruple for one single moment to discharge its own duty. Let us look at the facts of the case. I will speak of the alleged agreement presently. It is admitted on all hands there was a gale of wind at the time; and it is admitted that a great many vessels endeavoured to enter the narrow harbour of Lowestoft in a state of safety—that they were coming in, to use an ordinary expression, pell mell, to save the inclemency of the weather, and were in a state of considerable danger. The *Phantom* came in, not only in consequence of the state of the weather, but also, as mentioned by her master, because she had broken her boom. In she came, and she was not in that part of the harbour in which it was considered consistent with safety to remain; and for this obvious reason—she was at the entrance of the harbour, on the south side, and if she had remained there she was exposed to the chance of coming in contact with other vessels which were rushing in. Under those circumstances she was desirous of being removed to another and safer berth; and the question is, whether the assistance which was rendered by the appellants partakes of the nature of salvage, and whether they are entitled to any reward, or whether they are estopped by the agreement of 8*s.* 6*d.* As far as I make out from the evidence, in the first instance they took a small rope, which was not sufficient for the purpose; but they afterwards took a larger rope, which I think is described as being a three-inch warp, for the purpose of effecting the object of removing the vessel to the place desired. At or about that time—the evidence is not specific—a collision happens, which has been commented upon; and it has been said for the respondent that, with reference to that collision, the boatmen had nothing to do with it—that it did not increase their labours or augment the difficulty they had to encounter; but I am of opinion that it is a very powerful reason to shew the risk to which the vessel was exposed. The original reason why the vessel

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was moved—which was the danger from vessels entering the harbour, not anticipated danger, but that which took place—shews it was a matter of importance that the vessel should be moved from the place where she was to a place of greater safety. It appears to me that is perfectly clear. After the collision, what occurred? They were employed by the master to cut away the bowsprit, which was damaged: and, that being done, they completed their task. I believe that to be a fair statement of what actually was done, and all the occurrences of the case. I am of opinion that it is not necessary there should be absolute danger in order to constitute a salvage service; it is sufficient if there is a state of difficulty, and reasonable apprehension. There might be danger of further difficulty occurring, and I think it is proved in this case, from the facts to which I have adverted, that it was a matter of importance for the vessel to be moved—that she was, while she lay where she did, in reasonable apprehension of danger, and that reasonable apprehension was fulfilled by the accident that occurred. Certainly it is not a service of any importance, but I cannot bring my mind to the conclusion that it is a service to be ignored altogether, more especially if it is consistent with truth; and I do not find it denied that other vessels there were in collision, and masts and spars falling on all sides and there was risk to the asserted salvors in the service performed. I think there was a risk of that description. Now, seeing the state of the facts, let us see what the judgment is, and whether I can adhere to it. The magistrates say: "We think this is not a case of salvage at all; there is not one single ingredient of salvage in it." I must take the liberty of differing from those gentlemen, for I think there was, and I think the removing a vessel from apprehended danger, and real danger, does partake of the character of salvage service. They say: "The smack was not in a state of danger. She was in collision with another vessel, it is true, but that has nothing to do with danger—nothing whatever." Well, we are in the habit of considering collisions, but it is the first case, in my apprehension, that has ever occurred since I have sat here in which a collision can be said to have nothing to do with danger. Whatever else happens, it appears to me that, more or less, there is a certain degree of risk from collision. Then they say further:—"There

was no great risk in what you did." I do not know that it is necessary to constitute a salvage service that there should be great risk, but if persons perform a duty of this description, and incur any risk at all, certainly that circumstance ought to be considered, and there ought to be remuneration. "Therefore we dismiss the case altogether," and they make the applicants pay the costs. Now, unless there was a valid agreement binding upon the parties, I certainly think it would be the duty of the Court to overrule this judgment, for the reasons I have shortly specified. Is it a valid agreement? It is this, that when the vessel first came in, and when the salvors came and offered their assistance, they inquired whether there was anything they could do, and the master answered, according to his own account, that though he was not very particular, still, says he, "I will take you and give you 8*s.* 6*d.*" No doubt he swears that the agreement was for 8*s.* 6*d.* I will assume what he swears about the agreement is true. There is another matter in all agreements, when salvors are going to perform a duty, whether the agreement is just and equitable; because if it is not, however much it has been agreed upon by both parties, the Court is in the habit of overruling such an agreement if it is unjust and inequitable. Looking at the storm, seeing the vessel came in in consequence of it, and was moved by reason of danger apprehended, which proved to be real, I think the amount of 8*s.* 6*d.* utterly futile, and for these reasons I shall overrule the judgment. I think it is a service that requires a small sum of money, and I shall give 10*l.* and costs.

Proctors for appellants: *Shephard & Skipwith.*
Proctors for respondent: *Clarkson, Son & Cooper.*

1866
June 12.

THE JAMES SEDDON. JEFFARES.

Disbursements—Expenses incurred by master in defending himself against charge of murder.

A master, while at a foreign port with a homeward bound vessel, incurred expenses in defending himself against a charge of murder maliciously brought by two of the crew, whom he had censured for misconduct. The master was tried and acquitted, and bound over in a sum of 10*l.* to prosecute the men for perjury. He forfeited the 10*l.* in order to return with the vessel to England:—

Held, on a motion to review the report of the registrar in a suit for disbursements, 1st. That the master was entitled to the expenses of his defence, on the ground that the charge originated directly from the performance of his duty to his owners in chastising the men.

And, 2ndly, the Court allowed the 10*l.* forfeit, as it was for the interests of his owners that the master should not be delayed in returning with the vessel.

THIS was a motion on the part of the defendant, owner of the *James Seddon*, in objection to the report of the registrar and merchants in a cause of wages and disbursements, instituted by Richard Clifford Jeffares, late master of the *James Seddon*, against that vessel and the defendant, under the following circumstances:—

In November, 1863, the *James Seddon* left Liverpool under the command of the plaintiff, with a general cargo for Bombay. From Bombay she went to Madras, thence to Coconada, to Blimlipatam, back to Coconada, to Madras, and then home with a valuable cargo.

While the vessel lay at Coconada, several of the crew had exhibited a mutinous spirit, refusing to take in cargo after six o'clock. Accordingly the master, by the advice of the ship's agent, had the men arrested and sent to gaol for a month. At the expiration of their imprisonment he attended at the gaol, paid them their wages, and gave them their discharges. Two others of the crew, who were not openly implicated in this mutinous conduct, Abner Smith and James McAlpin, had expressed a wish at Bombay to be discharged from the ship, but the master refused to give them their discharges. Subsequently their conduct became bad; the master was then obliged to log one if not both of them, and thereupon they said they would be revenged upon

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him. Ultimately, the master discharged them at Coconada. After their discharge, these two men brought a charge of murder against the master, arising out of the circumstance that a man named McLeod had fallen overboard, whilst on a stage over the ship's side, and been drowned, and they accused the master of having intentionally caused his death, by letting go the rope by which the stage on which he was working had been made fast. The master was taken up on this charge before a native magistrate, and committed, but after a full trial he was acquitted, and was bound over in the sum of 10*l.* to prosecute the two men, Smith and McAlpin, on a charge of perjury and conspiracy.

However, before the trial came on, the vessel had got all her cargo on board, valued at about 100,000*l.*, and was ready to sail, and the agents, Messrs. Arbuthnot, urged the master not to delay, but to depart and forfeit the amount in which he had been bound, and he accordingly did so.

The accounts had been referred to the registrar and merchants, who allowed the master the expenses he had incurred in defending himself from the charge of murder, and also the 10*l.* forfeit.

Brett, Q.C., and *Butt*, for the defendant. This is a case of great importance. There are constantly charges being made against masters of manslaughter, assaults, &c., but it is the first time that it has been said that a master has a right to his costs of defending himself against such charges. Suppose the master had been guilty, could it be said that the costs of his defence would be an expense to which the owner would be liable? The master exceeded his right as agent of the owners. Story on Agency, s. 335; "another right of agents is, to be reimbursed all their advances, expenses, and disbursements, made in the course of their agency, on account of or for the benefit of their principal." Section 341, "the latter is liable only for such losses and damages as are direct and immediate, and naturally flow from the execution of the agency." Can these expenses be said to be, "on account of, or for the benefit of the principal?" The expenses incurred were not a "direct" consequence of the master's agency.

Milward, Q.C., and *Waddy* for the plaintiff. It is the master's duty to stick to the ship for the benefit of the owner, and it is for

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the owner's interest that the master should be able to perform his duty to him by doing so. It was the master's duty to defend himself, it was a part of his duty to his owners. The captain did that which he was bound as a prudent man to do in defending himself from the charge which was made against him, not as a criminal, but as captain of the ship. The captain was necessary to the ship to bring it back to England. As to the 10*l*., the claim was made by the Arbuthnots, as agents; they paid the fine in order that the master might come to England. The law charges were also paid by the Arbuthnots.

Dr. LUSHINGTON. The sole question before the Court is as to two items in the report of the registrar and merchants, and those items are substantially objected to on the ground that they were expenses incurred beyond the province of the master, and beyond the right which he could exercise as agent of the owners. With regard to the extent of the agency of a master in the employ of his owners, it would be next to impossible to come to anything like a definition—indeed, I believe absolutely impossible. There are certain broad limits, with which we are all well acquainted, within which the owners would never be responsible for the acts of the master: acts done by the master in cases where he has not a shadow of authority to interfere, and cases also of misconduct where it is abundantly clear, though grievous damage is done to others, yet the owners are not responsible. I remember a case which occurred in the Mersey, where the master of a tug, having been disappointed by a refusal of employment, absolutely went straight at the vessel in question, and run her down purposely. That case came before me, the owner of the vessel, which was an American, having sued in the court on account of the damage done. I was under the necessity of refusing to entertain the suit, because that which was done was an outrage committed, not in the performance of any duty whatever, but an act of vengeance in consequence of a disappointment. I apprehend that is the principle acted upon, not only here, but in other courts exactly on the same ground. In *The Gratitudine* (1), which was a question of agency, Lord Stowell said the master is not the agent of the cargo, but circum-

(1) 3 C. Rob. 260.

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stances may occur which necessarily impose upon him the duty of fulfilling the part of agent of the owner of the cargo. That I apprehend to be good sound law, good common sense, and generally for the benefit of the mercantile interests of the country. No one doubts it is a settted question of law, that it is the duty of the master to enforce discipline, or that that is for the convenience and advantage of owners, and is for the protection of the mercantile interests of the country. Let us look at the facts. There had been some disputes on board this vessel, and there were two men whom the master had refused to discharge, and who manifestly entertained a spite against him, and took advantage, in consequence of that spite, of an accidental occurrence, where a man unfortunately lost his life overboard, to bring a charge of murder against the master. In the first instance, I apprehend that the causing these men to be censured and chastised for their insubordination was part of the bounden duty of the master. Having fulfilled this duty, out of the performance of it comes manufactured a false charge. I differ entirely from the argument of Mr. Brett, that this is a remote and not a direct cause. The very cause which originated the charge against the master was the performance of his own duty in correcting these very men for their misconduct, and the false charge emanated instantly from it, and there were no intervening circumstances whatsoever which could cause it to be considered remote. Then the charge was made against him, and it takes the shape of a prosecution, as I understand it, for murder, and large expenses are incurred by the captain in defending himself against this false charge. What is that but defending himself against the consequences of the performance of his own duty, and which, if he had not performed, he would have been greatly to blame? For he would have been to blame if he had allowed, from fear of the consequences to himself, any false charge to be preferred against him. In the state of the commerce of this kingdom at present, you must not look with too close an eye to what duties are discharged by masters on board vessels. It is a very different thing when voyages now, out and home, comprehend sometimes two, three, and four years, and when the cargoes with which those ships are laden are 100,000*l.* or 200,000*l.* You must not fetter your

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masters too closely, and I say that the expenses now objected to were actually incurred for the benefit and advantage of the owners themselves. For what would have been the consequence? The master must have been incarcerated; he would not have been protected in any way against the false evidence brought against him; and even the temporary absence of the master in those distant countries would have been attended with great disadvantage, and serious inconvenience to the owners themselves. I entertain no doubt whatever of this. Far be it from me to say I would encourage a master in assuming to himself an authority the law does not confer upon him; but if I see the necessity of the case, the convenience of the case, and the discharge of duty, are all united in one transaction, it is also my duty to support a master, that he may not incur any expenses individually on account of having so acted. I have no doubt whatever about this first item, and I rely upon the grounds I have taken in support of it.

Now I come to the petty affair of 10*l.*, and I confess I am surprised, in a case like this, of a valuable ship and cargo, that the time of the registrar and merchants, which is so very valuable, should have been wasted in discussing this question; and at the arguments brought forward about the violation of the law and morality. The master entered into an arrangement for 10*l.* to appear to prosecute these men for perjury, when his personal appearance to prosecute would have caused him to delay, nobody knows how many days or weeks, with a cargo of 100,000*l.* It is really making a molehill into a mountain to say there was any violation of the laws of the country which by possibility could have stood between him and the interests of his owners, and more especially the interests of the owners, supported as they were by the agents of those very owners. What has it come to after all? The penalty is paid instead of the duty of prosecuting fulfilled. I have no hesitation in affirming the judgment of the registrar and merchants; and I must add, it is not merely the judgment of the registrar on which I rely, but here are merchants of great skill and practical knowledge, who well know the interests of shipowners in this country, and who have given their fiat of approbation to these expenses; and I believe that among the shipowners

in this country there will be found very few indeed who would quarrel with the allowance of the expenses in this report. I confirm the report, with costs. 1866 THE JAMES SEDDON.

Solicitor for plaintiff: *Thomas Martin.*

Solicitors for defendant: *Marshall, Westall, & Roberts.*

THE FAIR HAVEN. *May* 8.

Bottomry Bond—Prior Charges on ship.

The Court granted leave to bondholders to pay prior charges, and to have a lien on the ship, cargo, and freight, in respect of such payments, which were small in amount, on an affidavit specifying the charges to be paid.

THE *Fair Haven* had been arrested at the suit of the holders of a bottomry bond on the vessel and her cargo in the sum of 5500*l.*, and had been abandoned to the bondholders. There were charges in respect of towage, pilotage, &c., which had precedence over the bond.

Butt, on the part of the plaintiffs (the bondholders), moved for permission to pay all the prior liabilities of the ship, so as to avoid the expense of suits on behalf of the claimants, and to be allowed to have a lien upon the ship, cargo, and freight, in respect of such payments. The motion was supported by an affidavit of one of the bondholders, specifying the principal payments to be made.

DR. LUSHINGTON. I could not have granted this motion but for the affidavit which specifies the charges which the plaintiffs desire to pay. Nothing must be paid beyond those charges, and the plaintiffs must take the responsibility of seeing that they are correct payments. On looking at the smallness of the amount I grant the motion.

Proctors for plaintiffs: *Pritchard & Sons.*

1866.
May 15.

THE WHITE STAR. KERR.

Salvage—Contract to tow.

Where the master of a steamer engages to tow a vessel, it is upon the supposition that the wind and weather and the time of performing the service will be what are ordinary at the time of year; but if an unexpected change of weather, or other unforeseen accidents occur, he is bound to adhere to the vessel, and to do all in his power to rescue her from danger; and he will be entitled to reasonable extra remuneration for the extra service.

Circumstances under which such extra remuneration was allowed.

THIS was a cause of salvage brought by the owners of the steam-tugs *Alexandra*, *Nelson*, and *Enterprise*, and the masters and crews, against the ship *White Star*, cargo and freight, for services rendered on the 18th March, 1865. The *Alexandra* was of 110 tons burthen, with disconnecting engines of 120 actual horse power, and valued at 4000*l.*; the *Nelson* of 99 tons burthen, with engines of 90 horse power, and valued at 3000*l.*; the *Enterprise* of 120 tons burthen, with engines of 150 horse power, and valued at 5000*l.* The *White Star* was a ship of 2329 tons register, and at the time of the service was bound from Melbourne to London, laden with a general cargo worth between 100,000*l.* and 200,000*l.* On the 18th of March, 1865, the *White Star*, when in the English Channel, off Newhaven, engaged the *Alexandra* to tow her up to Gravesend, for 75*l.* without assistance, and 67*l.* 10*s.* if another tug was required. The *Alexandra*, having towed the ship for about three hours, the tug *Nelson* was employed to help the *Alexandra* for 35*l.* The tugs towed the vessel to off Hastings, where they were cast off, and on the 19th the ship wore and stood in for the land, picked up a pilot off Dungeness, and in the evening anchored off Folkestone, with both bower anchors. On the 20th the ship, in a heavy gale, dragged and slipped from both anchors and ran down past Dungeness. It was alleged by the owners of the ship, that upon her getting under weigh the sheet anchor and chain were got up, which was one of Trotman's patent of 43 cwt., more powerful than the anchors lost, and which on former voyages had frequently alone held the ship, and that the chain of 100 fathoms, $6\frac{3}{4}$ inch, was sufficient to ensure her safety. On the 20th and

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21st the easterly gale continued, and the ship stood on and off the land, and about midnight, as the weather moderated, she commenced beating up Channel; that early on the morning of the 22nd the assistance of a steam-tug, the *Napoleon*, was tendered but refused; that shortly afterwards the tugs *Alexandra* and *Nelson* rejoined the ship, and began towing her, she being then some ten miles from Dungeness. About one P.M. of the 22nd the steam-tug *Enterprise* came up, and it was arranged that the master of the *White Star* should be put ashore at Dover by the *Alexandra*, in order that the master might obtain an anchor and chain, which, however, he was unable to do of the size required, and he returned to the ship, and the pilot considered that a third tug was necessary to tow the vessel up to London, and the *Enterprise* was thereupon engaged, and the vessel was towed by the three tugs up to the entrance of the Victoria Docks, which she reached on the 23rd of March. The plaintiffs asserted that the *White Star*, her cargo and freight, the value of which together amounted to 218,000*l.*, were in considerable danger of being lost, but this the defendants denied, and contended that the anchor they had left was quite adequate to effect her security, and that the service was towage and not salvage.

Brett, Q.C., and *E. C. Clarkson*, for the plaintiffs.

Dr. Deane, Q.C., and *Vernon Lushington*, for the owners of the *White Star*.

Lodge, for the owners of the cargo.

Evidence having been given *vivâ voce*,

DR. LUSHINGTON, in his address to the Trinity Masters, after stating the facts, said:—The question is, whether the agreement was rendered invalid by anything which afterwards happened. No doubt the principles laid down by the Judicial Committee in the *Minnehaha* (1) are the true ones, and those which I have endeavoured to act upon for nearly thirty years. When I first came to the bench, I found considerable difficulty in determining whether a vessel engaged to tow another was bound, notwithstanding change of weather, to adhere to her, and perform services—not the service

(1) Lushington, 335.

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she originally engaged for, but a service which happened by accident to be superadded; and the doctrine I then held was, that she was bound to adhere to the vessel, and do all in her power to rescue her from danger, and she was to receive something additional, and not merely the remuneration originally agreed upon. The real question is, what are the contracting parties reasonably supposed to have intended by the engagement, and what degree of alteration had they a right to expect, because to suppose that the performance of the service would always be of the same character would be absurd. I apprehend that, when a master of a vessel contracts with the master of a tug, it is upon the supposition that the wind and weather, and the time for performing the service, will be what are ordinary at the time of year, and that the sum contracted for is that which is supposed to be a sufficient remuneration for the ordinary performance of the voyage. It may be a short voyage if all the circumstances are favourable, and it may be a long one if they are unfavourable. I shall submit to you that when an engagement is made—a contract—for a specific time, that contract must be adhered to, and is not to be broken hastily, unless it be shewn that circumstances have occurred which could not have been within the contemplation of the parties, and that such is the state of circumstances, that to insist upon the contract and hold it binding would be contrary to all principles of justice and equity. It would be utterly impossible to define all such circumstances, but I think we should never have any doubt in saying in any particular case what they were, which would give a right to abandon the contract. It has been argued for the tugs that a conversation took place, whereby the master of the *White Star* agreed with the masters of the *Alexandra* and *Nelson* that the whole should go to arbitration, or, in other words, that the original contract should be done away with, and that it should be as a matter of right referred to arbitration or the decision of this Court. I think the asserted salvors have not made out that case. I think, as the *Alexandra* went and put the master on shore to bring off further anchors, that that was an extra service, not connected in any way with the towage, and that they would, if they thought fit, have a right to have that determined by law; and I think the *Enterprise* has a right to

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come here for such reward as the law would give her for her services. But to say there was an express agreement and understanding that the contract originally made should be no longer binding upon the parties is, in my opinion, in no degree sustained by the evidence. Therefore, to avoid this contract, we must look to the facts of the case, and not to any supposed agreement alleged to have been made. The important question for you will be, what was the state and condition of the *White Star* after she had slipped from her two anchors. Whatever may have been the size and power of Trotman's anchor, would you think having that anchor alone it could be properly said the *White Star* was in a safe condition? I do not mean that she was exposed to immediate peril, but whether contingencies might not arise, in which, having a single anchor only, whatever might be its size and strength, she would be exposed to risk and peril which she should not encounter. If the tugs were merely ordinarily delayed in performing the service they must not have additional remuneration; but if the delay was unexpected, and beyond all contemplation, they must have something additional.

The Court and Trinity Masters retired for consultation, and, upon their return,

DR. LUSHINGTON said: We are all of opinion that a very small addition to that which has been tendered will be a sufficient reward for those who performed the services in question. Including the sums tendered, I shall give to the *Alexandra* 120*l.*, to the *Nelson* 100*l.*, to the *Enterprise* 75*l.*, and we all think that 10*l.* to the *Alexandra* for going into Dover is amply sufficient.

Proctors for plaintiffs: *Clarkson, Son, & Cooper.*
Proctors for owners of *White Star*: *Toller & Sons.*
Solicitors for owners of cargo: *Waltons & Bubb.*

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Sc 12 Jur N.S. 653.

Merchant Shipping Acts—17 & 18 *Vict. c.* 104, *ss.* 66, 70—25 & 26 *Vict. c.* 63, *s.* 3—*Co-owners—Cause of restraint—Mortgage.*

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Under the 66th section of the Merchant Shipping Act, 1854, and the 3rd section of the Merchant Shipping Act Amendment Act, 1862, the Court will look behind the register to the real character of transactions between co-owners, and treat as a mortgage that which is on the face of it an absolute transfer, if it should appear that such was the intention of the parties.

Under the 70th section of the Merchant Shipping Act, 1854, a mortgagee not in possession of the vessel cannot maintain an action of restraint.

Semble, the Court would in some cases recognise an agreement by which a person might be for some purposes an absolute owner, and for others a mortgagee, if such an agreement were clearly proved and definite.

A vessel having been arrested in a cause of restraint between co-owners, the Court, on a motion by the charterer, to whom the vessel had been let for a voyage, ordered her release; it appearing that the alleged co-owner was only a mortgagee.

THIS was a motion on behalf of Horatio Nelson Hughes, shipbroker, of Liverpool, the charterer of the ship *Innisfallen*, for the release of that vessel.

The *Innisfallen* had been arrested in a cause of restraint instituted by John Pile, of West Hartlepool, Durham, the alleged owner of 32 64th shares of the said ship, against his co-owners, who had let the vessel without his consent, for a voyage to New York. The co-owners had not appeared.

The questions raised on this motion were, whether John Pile was a co-owner or a mortgagee of the vessel, and if a mortgagee, whether he had a right to bring an action of restraint. The circumstances are fully detailed and commented on in the judgment.

The principal sections of the Merchant Shipping Act referred to are as follows:

17 & 18 Vict. c. 104, s. 66. "A registered ship or any share therein may be made a security for a loan or other valuable consideration; and the instrument creating such security hereinafter termed a mortgage, shall be in the form marked I. in the schedule hereto or as near thereto as circumstances permit; and on the production of such instrument, the registrar of the port at which

the ship is registered shall record the same in the register book."

S. 70. "A mortgagee shall not by reason of his mortgage be deemed to be the owner of a ship or any share therein, nor shall the mortgagor be deemed to have ceased to be owner of such mortgaged ship or share, except in so far as may be necessary for making such ship or share available as a security for the mortgage debt."

June 12. *Cohen,* in support of the motion. From a series of cases of which *Gardner* v. *Cazenove* (1), and *Ward* v. *Beck* (2), are the principal, the Court may look behind the register, and if a person to whom an absolute bill of sale has been delivered is proved to have been really a mortgagee of the ship, he will be treated as a mortgagee, and not as owner. If Pile, the plaintiff, is to be treated in this court as mortgagee, he has no right to institute a cause of restraint. *The Highlander* (3); *Collins* v. *Lamport.* (4)

Butt, contrà. This Court will not, in a suit between co-owners, look behind the register to ascertain the equitable rights of the parties. The plaintiff instituted a suit against co-owners; not one of them has come in, but a third person has come in, and claims an equitable right. *Collins* v. *Lamport* (4) does not apply. The plaintiff claims as registered owner, s. 43 of the Merchant Shipping Act, 1854. Either the court has not equitable jurisdiction in this matter, or will not exercise it.

Cohen replied.

Cur. adv. vult.

June 15. DR. LUSHINGTON. The facts of this case are as follow: In 1864, the *Innisfallen* was built by the firm of which the plaintiff is a partner, in their yard at West Hartlepool, for Messrs. Pirrie and Co. At the time of her completion, in October, 1864, half of the entire purchase money (23,750*l.*) remained unpaid. Under these circumstances, the plaintiff's firm drew bills for the balance due to them upon Messrs. Pirrie & Co. Messrs. Pirrie & Co. accepted the bills, and also caused the plaintiff to be duly registered as owner of 32 64th shares in the vessel, the plaintiff's firm at the

(1) 1 H. & N. 423.
(2) 32 L. J. (C.P.) 113; 9 Jur. N.S. 912.
(3) 2 Wm. Rob. 109.
(4) 34 L. J. (Ch.) 196; 11 Jur. N.S. 1; 4 De G. J. & S. 506

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same time writing to Messrs. Pirrie & Co. a letter in the following terms:

"Liverpool, 26th October, 1864.

Messrs. William Pirrie & Co.

We hold the 32 64th shares of the ship *Innisfallen*, registered in the name of our Mr. John Pile, as security against the bills drawn by us on your firm in payment of said ship, and we hereby bind ourselves to re-transfer to your firm the said 32 64th shares of said ship, on the due payment by you of these drafts.

Pile, Spence, & Co."

The above facts are not disputed. The plaintiff further deposes that the agreement between his firm and Messrs. Pirrie & Co. was, that one half of the vessel should be and continue the absolute property of his firm until the balance of the purchase money was paid. That this arrangement was insisted upon by the plaintiff's firm in lieu of a mortgage, because they considered that, as actual part-owner, the plaintiff would be able to exercise control over the movements of the vessel, which, as a mortgagee, he would not be entitled to exercise, and that on no other terms would the plaintiff's firm have let the vessel go out of their actual possession. The case stands thus: There is an absolute transfer into the plaintiff's name—a letter, which converted the transfer into a mortgage—an alleged verbal conversation, which re-converted it from a mortgage into a transfer, for some purposes. Of the bills so drawn by the plaintiff's firm, some have been met, others from time to time have been renewed, and there is now still owing to the plaintiff's firm about 8000*l.* upon the renewed bills. Such bills are not yet due, but Messrs. Pirrie & Co. have suspended payment. The vessel made one voyage, and arrived in London on the 19th of March, in the present year. Three days before, however, viz., on the 16th, the vessel was chartered without the consent of the plaintiff to the defendant, for a voyage to Bombay. The charter-party appears to be made by Messrs. Pirrie & Co. as owners, but the plaintiff swears that at that time Messrs. Pirrie & Co. had ceased to be even part-owners, having transferred their shares to other persons. The plaintiff, on discovery of the charter-party, instituted, as part-owner of the vessel, this action of restraint, to

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prevent her from proceeding to sea until security be given by the other co-owners to the extent of the plaintiff's interest in her, for her safe return to Liverpool; and he swears that he verily believes that if the vessel be allowed to go to sea there is great danger of the whole, or a large portion, of the balance of the purchase money being lost. The vessel was accordingly arrested. Neither Messrs. Pirrie & Co. nor their alleged transferrees have appeared; but the defendant, who is the charterer, has appeared to defend the action, and now moves the Court to order the vessel to be released without bail, and to condemn the plaintiff in costs. The defendant maintains, 1st. That the Court may look behind the register with a view to ascertain whether the real intention of the parties was to transfer the absolute ownership, or merely to effect a mortgage, and that the result of such an examination in the present case would be to shew that the plaintiff was intended to be a mortgagee only. 2nd. That a mortgagee has no right to bring an action of restraint. The plaintiff disputes these positions.

To take the last first. In the case of *Collins* v. *Lamport* (1), Lord Chancellor Westbury, on appeal, decided that, under the 70th section of the Merchant Shipping Act, 1854, so long as the mortgagee does not take possession of the ship, the mortgagor, being the registered owner subject to the mortgage, retains all the rights and powers of ownership, and that his contracts with regard to the ship will be valid, provided his dealings do not materially impair the security of the mortgagee; and, consequently, where the mortgagor in possession had made a charter-party which was not shewn to be in any way prejudicial to the sufficiency of the security, he held the mortgagee bound, and restrained him from dealing with the ship in any manner which might interfere with or prevent the execution of the charter-party. I accede to this view of the statute, and hold that a mortgagee not in possession cannot maintain an action of restraint. I may add that this was the practice of the Court even before the Merchant Shipping Act: *The Highlander*. (2) In the present instance there is no proof that the charter-party which has been entered into is an injurious one, or is likely to affect the position of a mortgagee of the vessel.

(1) 34 L. J. (Ch.) 196. (2) 2 Wm. Rob. 109.

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Then, as to the first point, the cases of *Gardner* v. *Cazenove* (1) and *Ward* v. *Beck* (2), cited at the hearing, are conclusive that the right interpretation of the 66th section of the Merchant Shipping Act of 1854, and of the 3rd section of the Merchant Shipping Act Amendment Act of 1862, is, that the Court is at liberty to look behind the register to the real character of the transaction, and to treat as a mortgage that which is, on the face of it, an absolute transfer, if it should appear that such was the intention of the parties. The question, then, remains—what was the intention of the parties in the present case? This is a question of fact. Looking to the documentary evidence alone, I could come to no other conclusion than that the plaintiff was a mere mortgagee. The letter which his firm wrote at the time to Messrs. Pirrie & Co., states in so many words that the shares were held as a security, and were to be re-transferred on the due payment of the drafts; in short, converted the act of registration from a sale to a pledge. But, then, the plaintiff would superinduce a concurrent verbal agreement which would have the effect of re-converting the pledge into an absolute transfer, at least for some purposes. The plaintiff swears that the arrangement was that, until the payment, the vessel should continue the absolute property of his firm, and that the arrangement was insisted upon in lieu of a mortgage, in order that the plaintiff should, as actual part-owner, exercise control over the movements of the vessel, to which, as a mortgagee, he would not be entitled. The result of the plaintiff's contention would be, that he was not exactly an absolute owner nor exactly a mortgagee, but that for some purposes he was an absolute owner, and for others a mortgagee. Now, without going the length of saying that the Court would in no case recognise such an agreement, so involved, as it were, wheel within wheel, I shall hold that the Court will not recognise it unless it is clearly proved, and definite, and complete in all its parts. In this respect I think the decision in the case already adverted to, of *Gardner* v. *Cazenove* (1), is to the point. In the present instance it cannot be said that, according to the plaintiff's view, the relation of the parties was defined. Whether or not, as between himself and Messrs. Pirrie & Co., the plaintiff accepted all, or some, or which, of the liabilities of part-owner, or with which

(1) 1 H. & N. 423. (2) 32 L. J. (C. P.) 113;

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of the rights of a part-owner Messrs. Pirrie & Co. intended to invest the plaintiff, as distinguished from those which the plaintiff thought he would acquire by the act of registration—all this the plaintiff leaves uncertain. On the whole, I am constrained to hold that the effect of the transaction was to constitute the plaintiff a mortgagee, and not a part-owner. This being so, the Court would not have been able to grant a restraint against the vessel at the plaintiff's instance, even if the defendant had had no locus standi to oppose the application. I must, therefore, grant the motion for the release of the vessel without bail; but, under the circumstances, I give no costs.

Motion granted.

Solicitors for plaintiff: *Marshall, Westall, & Roberts.*
Proctors for defendant: *Pritchard & Sons.*

THE MEGGIE.

July 3.

Admiralty Court Act, 1861 (24 *Vict. c.* 10, *s.* 8)—*Co-owners.*

In a cause between co-owners, under the 8th section of the Admiralty Court Act, 1861, the Court granted a citation in personam on the defendant, and a monition on the London Dock Company to bring in freight detained by them under a stop order from the defendant.

THIS was a cause instituted under the 8th section of the Admiralty Court Act, 1861, on behalf of John Nelson, of Wallsend, Northumberland, registered owner of 32-64th shares, and John Crosse Brookes, registered owner of 16-64th shares of the ship *Meggie*, against William Henry M'Creight, the registered owner of 8-64th shares of the said vessel, and the freight earned by her on her voyage from India to London, ending in March last. From the affidavit of John Crosse Brookes, it appeared that various disagreements had taken place between himself and M'Creight; and on the 4th April last, the *Meggie* having arrived in the London Docks, M'Creight had a stop order put on the freight, by serving a notice on the Dock Company, under the Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63), whereby a part of the freight, amounting to 1322*l.* 6*s.*, had been and was still detained by the Dock Company. The 8th section of the

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Admiralty Court Act, 1861 (24 Vict. c. 10), is as follows:—"The High Court of Admiralty shall have jurisdiction to decide all questions arising between the co-owners, or any of them, touching the ownership, possession, employment, and earnings of any ship registered at any port in England or Wales, or any share thereof, and may settle all accounts outstanding and unsettled between the parties in relation thereto, and may direct the said ship or any share thereof to be sold, and may make such order in the premises as to it shall seem fit."

Vernon Lushington moved for a citation against M'Creight, the owner of the 8-64th shares of the *Meggie*, and a warrant against the freight. The Court has jurisdiction over freight, the only question is in what way it is to be exercised: s. 35 of the Admiralty Court Act (24 Vict. c. 10) says "either by proceedings in rem or by proceedings in personam."

DR. LUSHINGTON. I think the proper course will be a monition against the Dock Company to bring in the freight, and proceedings against the owner in personam.

Proctor for plaintiff: *H. C. Coote.*

July 31.

THE KESTREL.

Mortgage Suit—Costs, charges, and expenses—Taxation—Items disallowed.

Mortgagees' costs in a mortgage suit will be taxed as between party and party, in accordance with the practice of the Court of Chancery, and not as between solicitors and clients, where a decree has been made by consent that the plaintiffs are to receive their "costs, charges, and expenses properly incurred."

On a motion by plaintiffs, mortgagees, to review the registrar's taxation, disallowing:—1st, charges by plaintiffs' solicitors for attending to take particulars of other suits against the vessel to which the plaintiffs were not parties;

2ndly, costs of negotiations between rival incumbrancers which led to nothing, and to which the owners of the vessel were not parties;

3rdly, costs of conference with counsel at a stage of the suit when it is not usual for a conference to be held;

The Court affirmed the registrar's taxation, and refused the motion with costs.

THIS was a motion to review the registrar's taxation of the plaintiffs' costs in a cause of mortgage instituted by James

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Morrish and Francis Nash, the first mortgagees, by transfer of the steam-ship *Kestrel*, against the proceeds of the sale of that vessel remaining in the registry of the court, the vessel having been sold in a suit of bottomry.

A decree had been made by consent that the plaintiffs should receive the sum claimed by them, and the "costs, charges, and expenses properly incurred" by them as mortgagees; and the question raised on this motion was, whether the taxation of those costs, &c., ought to be as between party and party, or as between solicitors and clients.

The circumstances of the case are fully stated in the judgment.

July 3. *Osborne Morgan*, in support of the motion. The whole question is as to costs, charges, and expenses of mortgagees. A mortgagee is not allowed to be out of pocket if his costs, charges, and expenses are fair: Fisher on the Law of Mortgage, p. 561. He is to be recouped all money which he is liable to pay, or has fairly expended: *Ramsden* v. *Langley* (1); *Lomax* v. *Hide* (2); *Dryden* v. *Frost*. (3) All the mortgagee has to shew is that he has not wantonly incurred costs. The registrar has taxed these bills as between party and party. Our objection is to the taxation on principle. We have really had no taxation at all. If the taxation has been on a wrong principle, the Court will send the bill back to the registrar to be reviewed.

E. C. Clarkson, for the owners. The suit was by the mortgagees to enforce their security; it was a hostile suit. They were entitled only to costs as between party and party. The term "costs, charges, and expenses properly incurred," implies some discretion in the registrar as to what he shall allow.

Morgan replied.

Cur. adv. vult.

July 31. DR. LUSHINGTON delivered judgment. There is no question that can come before the Court which is so disagreeable as that of reviewing the taxation of costs, because it is manifestly clear that, for the greater part, it is impossible to find a clear principle whereon to proceed, and whether the charge be right or wrong depends upon a practice, and upon a practice with which

(1) 2 Vern. 535. (2) 2 Vern. 185. (3) Milne & Craig, 670.

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the Court cannot be familiar, and can only obtain information by applying to other sources. This is a motion for the Court to review the taxation of the registrar. This vessel has been the subject of much litigation. Amongst other suits instituted against her are the following:—1864, September, No. 2357, by a bottomry bondholder; October, No. 2398, by the third mortgagee; November, No. 2414, by the second mortgagee. In these suits the first mortgagees were defendants. 1865, February, No. 2616, by the first mortgagees. The last cause, the one in which the first mortgagees are plaintiffs, is the one in which this motion is made. Besides these suits in the Admiralty Court, in which the first mortgagees were plaintiffs or defendants, there were other suits to which they were not parties, and there was also a Chancery suit (*Smith* v. *Morrish*) instituted by the trustees for the creditors of the owners of the vessel, in which the first and other mortgagees were defendants. The vessel was sold in the suit of the bondholder, No. 2357, and the proceeds, amounting to 12,050*l.*, were paid into the registry. On the 8th of December, 1865, a compromise of this suit (No. 2616, by the first mortgagees) was entered into between the solicitors for the various parties interested in the proceeds of the vessel, viz. the trustees for the creditors of the late owners, the third mortgagees, the second mortgagees, and the first mortgagees. This compromise was carried into effect by the decree of the Court of the 12th December following. By that decree the proceeds of the ship were condemned in a specified sum of 5655*l.* 6*s.* 1*d.* for principal and interest due to the first mortgagees, and in the costs, charges, and expenses properly incurred by them as mortgagees, including therein the costs incurred by the first mortgagees as defendants in the above-mentioned Chancery suit, and in the causes in this court, Nos. 2357, 2398, 2414, instituted respectively by the bondholder, the third mortgagee, and the second mortgagee. Subsequently, the plaintiffs, the first mortgagees, brought in their several accounts of costs to the registry, consisting of—1st, costs of first mortgagees as plaintiffs in 2616; 2nd, costs of first mortgagees as defendants in 2357; 3rd, costs of first mortgagees as defendants in 2398; 4th, costs of first mortgagees as defendants in 2414; 5th, costs of first mortgagees as defendants in Chancery

suit; 6th, a separate account of charges by Messrs. Davidson & Co., the solicitors for the first mortgagees. The fifth account was taxed by the Master in Chancery, to whom it was referred. The other accounts were taxed by the registrar, and it is to review his taxation of the costs of the first account and of the sixth account that the present motion is made by the plaintiffs. The chief ground of complaint by the plaintiffs is, that their costs have not been taxed as between solicitors and clients. On this question I have endeavoured to obtain, from the most competent persons, information, and I am informed that in a mortgage suit in the Court of Chancery, the mortgagee's costs are always taxed as costs between party and party; and I cannot construe the provision in the decree which was made by consent, that the plaintiffs should receive their costs, charges, and expenses properly incurred, to mean that their costs should be taxed as between solicitors and clients. The exact meaning of that term "costs, charges, and expenses properly incurred," it is impossible to define beforehand. In a mortgage suit it would, I apprehend, consist of expenses incurred by the mortgagee in the protection of his security. Whether or not any expense has been properly or improperly incurred, must obviously depend upon the circumstances of each case. It is necessary, therefore, to go into further detail. With regard to the registrar's taxation of the bill of costs for this suit, in which the first mortgagees were plaintiffs, three classes of items are specified by the plaintiffs as having been improperly disallowed. The first class consists of charges by the plaintiffs' solicitors for attending to take particulars of the other suits instituted in this court against the vessel—suits in which the first mortgagees were not parties. As to these, however, I am of opinion that they are covered by the fees allowed to the plaintiffs for instituting their own suit. In point of fact, such inquiries as to other suits are a necessary preliminary to any plaintiff in order to enable him to shape his suit aright. But such an inquiry consists simply in a reference to the Cause Book, for no person who has not appeared in a suit can claim to see the documents in that suit. The second class consists of certain negotiations that took place between the various incumbrancers of the fund. There are two reasons why these costs should not be

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considered as properly incurred, so as to be chargeable against the fund—one, that the negotiations led to nothing; the other, that the owners of the vessel (who would be entitled to the residue of the fund after paying off the incumbrances) were not parties to them. I quite agree, therefore, with the registrar, that it would be improper to saddle the fund with these costs. The third class were thus incurred:—At the last moment the validity of the claim of the first mortgagees was disputed by the third mortgagee. The first mortgagees thereupon consulted their counsel as to whether they should get rid of the opposition of the third mortgagee by disputing his right to oppose on the ground that his mortgage had been obtained by fraud. I had some doubt as to this item; but, upon further consideration, I think the costs of this conference were rightly disallowed by the registrar, on the ground that the conference was held at a stage of the suit when it is not usual to allow for a conference to be held. The registrar further disallowed most of the items in the bill No. 6. The bill seems to have been sent in by the plaintiffs as an account of costs, charges, and expenses properly incurred, as distinct from the proper costs of the several suits. On examination it proves to contain many items of a kind already alluded to, viz. items for the cost of negotiations between the rival incumbrancers on the fund, which I have already held were properly disallowed by the registrar. It also includes items for consultations between the proctors and solicitors of the plaintiffs, for communications between the proctors and their clients, although charges in the other bills had been allowed for instructions; also items which are duplicates of charges made in the other bills and allowed. All these items the registrar, in my opinion, did right to disallow; and, generally, he seems to me, in this taxation, to have proceeded upon a correct principle, and to have exercised his discretion in a just manner. I shall, therefore, refuse the motion with costs.

Proctors for plaintiffs in mortgage suit: *Deacon, Son, & Rogers.*

Solicitors for plaintiffs in Chancery suit: *Davidson, Carr, & Bannister.*

Solicitors for defendants: *Gregory & Rowcliffes; Lowless, Nelson, & Goodman.*

THE COLLIER. 1866

Salvage—Owners of salving and charterers of salved vessel, the same persons—Pleading. *July* 31.

The owners of a vessel rendering salvage services, being also the charterers of the vessel receiving the services, are not thereby debarred from claiming salvage reward, unless the effect of the charterparty has been to divest the owners of the possession and control of the salved vessel, and to transfer the same for the time to the charterers.

The *Maria Jane* (1) distinguished. The *Waterloo* (2) followed.

On a motion by the plaintiffs, salvors, in objection to certain articles of the defendants' answer, which averred that though the services rendered might be of the nature of salvage service, yet that because the owners of the salving, and the charterers of the salved, vessel were the same persons, no salvage was due; the Court ordered the article denying that any salvage was due, to be struck out, but not the other articles detailing the facts, which if proved might not bar the claim for salvage, but might affect the quantum.

THIS was a motion on the part of the plaintiffs in objection to the following articles of the defendants' answer in a cause of salvage brought by the Brighton Railway Company the owners, and the master and crew of the steam-ship *Lyons*, against the steamer *Collier* her cargo and freight.

The petition alleged in substance, that on the 31st of October last, the steam-ship *Lyons*, while on a voyage from Newhaven to Dieppe, fell in with the *Collier* in a disabled condition; took her in tow, and after considerable difficulty towed her into the port of Newhaven.

The portions of the answers objected to were as follow:

2. "The *Collier* at such time was under a time charterparty from her owners to the London, Brighton, and South Coast Railway Company, the owners of the steam-ship *Lyons*, plaintiffs in this cause, and was at such time engaged in the regular packet service of the said company between Little Hampton and Honfleur aforesaid, and the said cargo and passengers of the *Collier* had been taken on board and were being carried in the *Collier* by the said company for their own benefit and the freight and passage money for such carriage belonged to the said company."

The 3rd article, after stating the facts, alleged that "those on

(1) 14 Jur. 857. (2) 2 Dods. 433.

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board the *Collier*, knowing that the *Lyons* belonged to the London, Brighton, and South Coast Railway Company, signalled the *Lyons* in the belief that it would be for the best interest of the said company for the *Lyons* to assist the *Collier*, and the *Lyons* in consequence of such signal bore down to the *Collier* and reached her at about 3.30 P.M., of the same day."

4. "The master of the *Collier* then informed those on board the *Lyons* (who were aware that the *Collier* was in the service of the owners of the *Lyons*), that a warp had been entangled in the screw of the *Collier* and requested that the *Lyons* would tow the *Collier* with her to Dieppe."

12. "By reason of the premises neither the owners of the *Lyons* nor her master and crew are entitled to salvage remuneration in respect of their services to the *Collier* or to her cargo."

July 17. *Dr. Deane, Q.C.*, in support of the motion cited the *Waterloo*. (1)

E. C. Clarkson, contrà. The company were merely assisting a vessel chartered to them: they were bound to take the *Collier* in tow: The *Maria Jane*. (2) The master and crew of the salving vessel are in the service of the charterers.

Dr. Deane, Q.C., in reply. The difference between the *Maria Jane* (2) and this case is such that they cannot be compared: in this case there is no mutuality.

Cur. adv. vult.

July 31. DR. LUSHINGTON delivered judgment. This is a cause of salvage brought by the master, owners, and crew of the *Lyons* against this vessel, the *Collier*, her cargo and freight. A petition has been given in and an answer filed on behalf of the owners of the *Collier*, and of the owners of her cargo. The plaintiffs now object to the admission of the 2nd, 3rd, 4th and 12th articles of the answer—articles the effect of which is to aver, that though the services rendered by the *Lyons* may have been of the nature of salvage services, yet that no salvage is due, because the owners of the *Lyons* and the charterers of the *Collier* are the same persons—viz. the London, Brighton, and South Coast Railway Company. It appears that at the time the salvage service was rendered the *Collier* was under a

(1) 2 Dods. 433. (2) 14 Jur. 857.

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charterparty to the railway company. The terms, so far as are material to the present motion, were, that the *Collier* was let for the sole use of the charterers for the space of three months; that the captain should use all despatch in prosecuting the voyage, and that the crew should render all possible assistance with the vessel's boats, and in loading and discharging the vessel, consistent with their other duties; that the owners (not the charterers) should find ship's stores and pay crew's wages; that all derelicts and salvages should be for owners' and charterers' benefit, in moieties to each, after settling with the crew; that the owners should appoint their own captain and engineer, who, with all the crew, should be under the control of the superintendent and agent of the charterers; and should any occasion arise for appointing a new captain, officers, and crew, the appointment was to be made jointly by the charterers, superintendent, and the owners. The *Lyons*, as I have said, belonged to and was in the employ of the railway company. The defendants, in support of their articles to which objection is made, relied on the case of the *Maria Jane* (1), as a case where a claim for salvage against a ship was rejected, although salvage services had been rendered, because the ships rendering the services belonged to the person who was the charterer of the vessel receiving those services. But, in that case, the effect of the charterparty was to divest the owners of the possession and control of the vessel, and to transfer the same for the time to the charterer, who was required to provide and pay for the master and crew. And it was on this ground—the ground of the charterer being in possession of the salved vessel—that the judgment proceeded. The Court held that the claim for salvage could not be maintained against the owners of the salved vessel by the charterer of that vessel in his other capacity as owner of the vessels rendering the salvage services, or by his servants on board those vessels. In the present case the circumstances are obviously different. The charterers of the *Collier* were not in possession; the owners paid the wages of the crew. The *Maria Jane* (1), therefore, is not a case in point. On the other hand, the plaintiffs cited the case of the *Waterloo*. (2) That was a claim of salvage preferred by the owners, officers, and crew of the *Winchelsea* for services rendered to the *Waterloo* and

(1) 14 Jur. 857. (2) 2 Dods. 433.

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her cargo. The *Winchelsea* at the time was chartered to the East India Company, but her commander, officers, and crew were appointed by her owners. The *Waterloo* and the bulk of her cargo were owned by the East India Company. Lord Stowell allowed the claim for salvage, having, in a very luminous judgment, discussed all the circumstances of that case. I think that the *Maria Jane* (1) does not apply to the present case, and that the principles laid down in the *Waterloo* (2) govern it. The argument against a claim for salvage is founded on the supposition that the salvor is claiming in substance for the salving his own property, which, certainly, is against reason. There is no place for such an argument here, as the owners of the *Collier* are not the owners of the *Lyons*. The *Collier* is chartered to the Brighton Company, but the owners of the *Collier* are not divested of possession, as was substantially the case in the *Maria Jane*. (1) These questions are not without difficulty, for distinctions might be taken between the owners of the salving ship and the crew and the property in the cargo. Again, I am not prepared to say that there may not be such a connection between two ships which, though it would not bar a claim for salvage, might affect the quantum. I shall order the 12th article to be struck out, which denies that any salvage whatever was due; but not the three first articles, which, though the facts therein detailed, if proved, would not bar a claim for salvage, might possibly affect the quantum. I think it right to be upon my guard, because, no doubt, the amount and quantum of a salvage service may be affected by particular circumstances, though the claim for salvage is not barred. I speak, for instance, where fishing vessels render assistance to each other, and matters of that description. That is the view the Court holds.

Proctors for plaintiffs: *Deacon, Son, & Rogers.*
Proctors for defendants: *Clarkson, Son, & Cooper.*

(1) 14 Jur. 857. (2) 2 Dods. 433.

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July 31.

Salvage services rendered by agents—Tender before suit—Costs.

Where ship agents render extraordinary services in saving property, the Court will, under particular circumstances, allow a claim as agent and a claim as salvor to be united.

The plaintiffs, ship-agents, were engaged by the defendants, owners of the cargo, to discharge a cargo of flour from a vessel wrecked on the beach. The plaintiffs, in rendering the service, incurred no personal risk, but disbursed for wages, &c. about 119*l.* The defendants tendered to the plaintiffs 150*l.*, which was refused; they afterwards paid them, through the auctioneer who sold the cargo, 50*l.*, as part of the commission on the sale. The plaintiffs then sued for salvage services. The defendants paid 150*l.* into court, altogether 200*l.*—80*l.* in excess of the plaintiffs' disbursements. The Court held that the sum of 80*l.* was sufficient, whether the services were salvage or agency, and gave judgment for the defendants; and as they had made a sufficient tender in time to prevent litigation, with costs.

THIS was a cause of salvage brought by Samuel Dewdney and Frederick Jarman Collier, ship agents at Brixham, against the cargo lately laden on board the vessel *Honor*, and against the owners of the cargo, for services rendered on the 11th of January last, in landing a cargo of flour from the vessel, which was stranded on the shore in Brixham Bay.

The cause was heard on the 10th of July, when evidence was given vivâ voce.

Brett, Q.C., and *E. C. Clarkson*, for the plaintiffs.

Milward, Q.C., and *Vernon Lushington*, for the defendants.

Cur. adv. vult.

July 31. DR. LUSHINGTON gave judgment.

This is a salvage suit instituted by Messrs. Collier and Dewdney, ship agents at Brixham, against the cargo of the brigantine *Honor*. On the 10th of January, in the present year, the *Honor*, laden with a cargo of flour, was stranded in Brixham Bay, at the back of the breakwater. The crew all got ashore, but it was found impossible to get the vessel off. On the 12th, the master went to the office of the plaintiffs, for what purpose—whether or not, as stated in the answer, to note his protest there—does not appear, for Mr. Collier, who was present on the occasion, was not placed in

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the witness box; but of this there is no doubt, that, being at the office, the master requested the plaintiffs to send down men to the breakwater to recover the cargo. The plaintiffs did send down men, taking them off from other work on which they were engaged. Before the cargo could be touched, the plaintiffs entered into the usual bond with the Custom House authorities. In the first instance there was some difficulty, and possibly some risk, in getting on board the vessel by means of a rope connecting the vessel and the shore. Subsequently a staging was erected from the breakwater to the *Honor*, and this enabled the men to proceed with the work of unloading the cargo regularly, and, I may say, with safety. They worked with but little intermission for five consecutive days and nights, and received from the plaintiffs payment at the rate, generally, of 5*s.* each per tide. At times the vessel rolled about, and on one occasion two men slipped overboard, but were at once rescued. Eventually the vessel became a wreck. The cargo was abandoned to the insurers, the Thames and Mersey Insurance Company (Limited); and on Monday, the 15th of January—that is, after part of the cargo had been got out—Mr. Touzel, of Liverpool, arrived at Brixham to act on their behalf, and the bills of lading were forwarded to him from the owners of the cargo. Various attempts were made, in the first instance, to have the cargo sold by private contract by Messrs. Collier & Dewdney, and also by a Mr. Smith, and it appears that a discussion arose between Messrs. Dewdney & Collier on the one hand, and Mr. Smith on the other, as to whether Mr. Smith, in case he should effect the sale, should be obliged to give half his commission to Messrs. Dewdney & Collier. In this discussion Mr. Dewdney certainly took an active part on behalf of his firm. Eventually, no private offers having been made which were considered satisfactory, Mr. Touzel placed the cargo in the hands of Mr. Smith to sell by public auction, upon the condition—to which Mr. Smith acceded—that he should give half of the commission to Messrs. Collier & Dewdney. I should here mention that Mr. Collier has a separate business, of public auctioneer, in which Mr. Dewdney, his partner in the ship agency business, has no share. Mr. Smith accordingly, on the 3rd of February, conducted the sale, which produced 2200*l.* On the 5th, Messrs. Collier &

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Dewdney, as agents for the consignees and underwriters of the *Honor's* cargo, wrote to ask him for an account of the sale. On the same day Mr. Smith gave to Collier a cheque for 50*l.* in favour of Messrs. Collier, Dewdney, and Vittery, and Collier gave him a receipt in full at the bottom of an account, which was furnished to him by Mr. Smith, and which was headed by the words—"R. W. Smith having offered to give up one half of the commission on the sale of the flour ex *Honor*, on the breakwater, Feb. 3, to Messrs. Vittery, Collier, & Dewdney." Mr. Vittery is the banker of the firm of the plaintiffs, and a relation to one of them. Why his name was mixed up in the transaction he himself could not explain, but Mr. Smith accounted for it by saying that it was not unusual for auctioneers to give a share of their commission to the persons introducing them to the business, and that as it was at Mr. Vittery's office where the arrangements for the sale of the cargo had first been made, he inserted Mr. Vittery's name in the account and in the cheque. Mr. Dewdney, in his examination, deposed that he had not received, and did not expect to receive, any part of this 50*l.*, and that he told Mr. Touzel that he had nothing to do with Mr. Collier's business as a public auctioneer. Mr. Collier himself—who, of course, could furnish a complete account of the transaction—was not called. Under these circumstances, and looking especially to what Mr. Dewdney had previously done respecting the commission from the then anticipated private auction, and to the fact that Mr. Collier had nothing whatever personally to do with conducting the public auction, I must hold that this 50*l.* was caused by Mr. Touzel to be paid as a bonus to the firm of Collier & Dewdney. The sale took place, as I have said, on Saturday, the 3rd of February. Mr. Touzel had repeatedly asked the plaintiffs for their account, but it was not delivered till the sale was actually going on, and therefore could not be examined at the time. But that it had been intended that the amount should be paid before the sale, is clear from one of the conditions, which was, that each lot should be at the risk of the purchaser immediately after the sale, and was to be removed at his expense, and if not paid for and taken charge of before six o'clock in the afternoon of the day of sale, the vendor was to be at liberty to re-sell the same. Mr. Dewdney himself bid for some of

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the lots. After the sale was over, Mr. Touzel examined the account of the plaintiffs, which was as follows:

"The consignees and owners of cargo of flour on the brigantine *Honor*, debtors to Collier & Dewdney for disbursements and expenses on said cargo, 1866, January, paid labour discharging cargo, 104*l.* 8*s.* 6*d.*; Baxter, for rent of yard, 6*l.*; survey on cargo, 3*l.* 3*s.*; harbour dues, 15*l.* 15*s.* 7½*d.*; commission and expenses attending saving cargo and advances, correspondences, postages, 125*l.*; duty, 96*l.* 6*s.* 7*d.*; total, 350*l.* 13*s.* 8½*d.*"

Two of the items in this bill—viz. harbour dues, 15*l.* 15*s.* 7½*d.*, and duty, 96*l.* 6*s.* 7*d.*—were, together with an additional 2*l.* 0*s.* 4*d.* (demanded by the officers of the Customs), in the first instance paid by the plaintiffs, but, at the request of Mr. Touzel, they withdrew their cheque, and he paid the money himself. The object of this was to save the commission that would be payable to the plaintiffs for making the disbursement. Mr. Touzel was there, supplied with money for the express purpose of paying what was necessary, and, therefore, there was no need for him to employ another person. Mr. Dewdney, however, swears that his firm withdrew their cheque only upon the express promise of Mr. Touzel that he would pay the rest of their account as delivered. But this statement appears to me improbable. Mr. Touzel refused to pay the item of 125*l.* for commission and expenses attending saving cargo and advances, correspondences, postage. This commission was 5 per cent. upon the supposed value of the cargo. Mr. Touzel offered to pay the plaintiffs the rest of their bill, and to pay the 125*l.* into the bank of Mr. Vittery, but this offer was refused. On Tuesday, Feb. 6, the plaintiffs wrote to Mr. Touzel to say that unless their demand was satisfied they would institute proceedings; and forthwith, according to Mr. Dewdney, they telegraphed to London to arrest the cargo. On the same day Mr. Touzel went to Plymouth and took legal advice, and on the following day, Wednesday, the 7th, offered 150*l.* in gold. But the offer was refused, Mr. Dewdney saying "All or none." And on the same day, Wednesday, the 7th, the plaintiffs instituted this action for salvage, and they arrested the cargo in no less a sum than 1500*l.* Subsequently they released it upon bail to the amount of 1000*l.* The defendants have paid 150*l.* into court. With

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regard to the claim of the plaintiffs to be considered salvors, it is clear that they were not volunteers in the matter. They were engaged by the master; and whether the master, in so engaging them, was acting for the owners of cargo or underwriters, is quite immaterial. Nor did the plaintiffs incur any personal risk, if, indeed, any serious risk was incurred by anybody. Until they instituted the present suit the plaintiffs seem never to have made a claim as salvors. Both in their letter to Mr. Smith, calling upon him for an account of the sale, and in the account which they themselves submitted to the defendants, they professed to be acting as agents for the consignees and owners of cargo. It certainly would open the door to abuse if ship agents were encouraged first to send in charges in their character of ship agents, and then, when those charges are disputed, to turn round and assert themselves salvors. On the other hand, it would be unjust that for extraordinary services the remuneration should be restricted to the ordinary commission allowed to ship agents of 5 per cent. upon disbursements. The truth is, that in cases like the present, where ship agents are employed to discharge a cargo from a vessel wrecked on a beach, it becomes a matter of nicety to draw the line between salvage services and agency services. For this reason, the Court, on previous occasions, has entertained similar applications to the present. The *Favourite*. (1) The *Purissima Concepcion*. (2) In the case of the *Purissima Concepcion*, the Court went very fully into the question, and I think it unnecessary to occupy time in stating it with more particularity; but the result of it was this, that the Court would allow a claim as agent and a claim as salvor to be united and combined under particular circumstances. If the Court had not done that, and had attempted to draw the line in all cases where agency was claimed, assistance would have been refused, and it would have led to mischievous consequences. I shall not, therefore, refuse to consider the merits of the case. It turns out that the actual disbursements of the plaintiffs were rather greater than they at first supposed, and amounted to 119*l.* 8*s.* 2*d.* The defendants have paid through Mr. Smith 50*l.*, and have paid into court 150*l.*, altogether 200*l.*—that is, 80*l.* odd in excess of the disbursements of the plaintiffs.

(1) 2 W. Rob. 255. (2) 3 W. Rob. 181.

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It seems to me that, looking to the character of the services performed, and to the fact that the plaintiffs incurred no personal risk, 80*l.* is sufficient remuneration to the plaintiffs, whether those services are considered to partake more of the character of salvage services or more of the character of agency services. The demand of 125*l.* made by the plaintiffs is, in my opinion, exorbitant. My judgment must, therefore, be for the defendants, and, as they made a legal and sufficient tender in proper time to prevent this litigation, with costs.

Solicitors for plaintiffs: *Lowless, Nelson, & Goodman.*

Solicitors for defendants: *Gregory & Rowcliffes,* agents for *Duncans, Squarey, Blackmore, & Co.,* Liverpool.

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April 17.

Collision—Sailing Rules, Articles 13, 14, 19.

Article 13 of the Sailing Rules (under 25 & 26 Vict. c. 63, s. 25) provides that "if two ships under steam are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other."

Art. 14. "If two ships under steam are crossing, so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other."

Art. 19. "In obeying and construing these rules, due regard must be had to all dangers of navigation; and due regard must also be had to any special circumstances which may exist in any particular case, rendering a departure from the above rules necessary, in order to avoid immediate danger."

In a cause of collision between two steam-vessels meeting nearly end on in the river Thames, it was alleged by the defendants that the helm of their vessel was put a-starboard to avoid a barge:—

Held, that the onus of proving that a departure from the 13th rule was "necessary, in order to avoid immediate danger," lay upon the defendants; and that, in the absence of sufficient evidence to shew what became of the barge, the defendants had failed in their proof, and were, therefore, to blame for the collision, the result of not porting their helm.

COLLISION. This was a cause of damage instituted by the owners of the screw steamship *Esther*, against the paddle-wheel steamship *Concordia*.

The petition alleged that between 12 and 1 P.M. of the 16th of November, 1865, the French screw steamship *Esther*, of 261 tons register, whilst in prosecution of a voyage from London to Rouen and Paris with a general cargo, and in charge of a duly licensed Trinity pilot, was off Irongate Wharf tier, in the river Thames; that the wind at such time was easterly, the weather fine and clear, the tide nearly high water, and of the force of about one knot an hour; and the *Esther*, under steam, was proceeding down the river nearly in mid-channel, at the rate of about three knots an hour, with a careful look-out being kept on board her; that at such time the above-named paddle-wheel steamer *Concordia* was seen coming up the river under steam nearly a-head of, and at a distance of about one-third of a mile from, the *Esther*. The helm of the *Esther* was ported, and afterwards put hard a-port; but those on board the *Concordia* did not port the helm of the *Concordia*, as

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they ought to have done, but, on the contrary, improperly starboarded the same, and although the engines of the *Esther* were stopped and reversed, the *Concordia*, without having duly stopped and reversed her engines, came into collision with the *Esther*, the starboard fore-sponson of the *Concordia* taking the stem of the *Esther*, and thereby great damage was occasioned to the *Esther*; and that the said collision was occasioned by the improper conduct of those on board the *Concordia* in neglecting to keep a good look-out, in neglecting to port their vessel's helm, in improperly starboarding their helm, and in neglecting to duly stop and reverse the engines of the *Concordia*, or by some or one of such acts and defaults, or otherwise by the improper navigation of the *Concordia*.

The defendants by their answer denied the statements contained in the petition, and alleged that on the 16th of November last, the *Concordia* was on her passage from Boulogne to London with passengers and cargo, and about 12·45 P.M. was in the river Thames about off the Irish tier. She was being navigated very carefully and slowly up the river to the southward of mid-channel, proceeding at the rate of about two knots an hour, and frequently stopping on account of the craft in the river. The wind was very light, from the westward; the tide was nearly high water; the weather was fine, but hazy; that shortly before the screw steamer *Esther* was observed, the helm of the *Concordia* was put hard a-starboard to avoid a barge. The *Esther* was then noticed coming down the river about a quarter of a mile distant on the *Concordia's* starboard bow. If the *Esther* had kept her course there would have been no risk of collision, but the *Esther* would have passed well clear on the starboard hand of the *Concordia*. The *Concordia's* helm was accordingly kept hard a-starboard, but as she had very little way through the water, her head did not pay off considerably; the *Esther*, however, improperly and without any reason, put her helm hard a-port and came towards the *Concordia*, whereupon the *Concordia* stopped and reversed her engines, but the *Esther*, notwithstanding she was hailed, drove stem on with great violence into the starboard fore-sponson of the *Concordia*.

The cause was heard on the 17th of March, when a great deal of very contradictory evidence was given, which for the purpose of

this report is sufficiently alluded to in the summing up of the learned judge.

Dr. Deane, Q.C., and *E. C. Clarkson*, appeared for the plaintiffs. *Milward, Q.C.*, and *Vernon Lushington*, for the defendants.

DR. LUSHINGTON, addressing the Trinity Masters, after alluding to the contradictory nature of the evidence, said: "The questions raised here are whether the *Concordia* was not bound to have ported her helm, and whether again the *Esther* was not to blame for having improperly ported her helm, so as to bring about this collision. By the 13th article of the Sailing Rules, "If two ships under steam are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other." Now, the first question that arises is, whether these two steamships were meeting end on or nearly end on, because if they were so meeting, then, according to the above directions, the helms of both ought to have been put to port, and it is clear that the helm of one was not put to port. There are exceptions to this rule, and the exceptions are in the 19th article, which states that "due regard must be had to all dangers of navigation, and due regard must also be had to any special circumstances which may exist in any particular case, rendering a departure from the above rules necessary in order to avoid immediate danger."

Now, suppose that these two vessels were meeting end on, the one coming up the river, and the other going down, and that, primâ facie, the helms of both ought to have been put to port, the next consideration will be, whether there were any special circumstances which would justify a departure from the 13th rule. The immediate danger on the present occasion seems to have been that there were several barges in the way, and that if the *Concordia* had not starboarded her helm, she would have run over one of the barges, and there would have been immediate danger, not only of destruction of property, but of destruction of life also. Upon this point I confess I feel some difficulty, for I am unable, through the evidence, to trace what became of that barge. If the case was that the *Concordia* had passed the barge and got a-head of her,

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then of course there would have been no immediate danger in porting her helm; but I can find no evidence to satisfy my mind as to what became of that particular barge. Therefore, if it were put to me whether there was any immediate danger of coming into contact with that particular barge, I should say there is not evidence to satisfy my mind of the fact. With respect to other barges the evidence is very contradictory. According to the evidence of Mr. James, the harbour-master, there were barges all round the *Concordia;* and when he was asked whether the *Esther* could proceed upon her course in safety down the river, his answer was, "She could not have kept her course down the river;" and in answer to questions put by myself, Mr. James said "there were so many barges all round, that neither could the *Esther* continue her course straight down the river in the direction she was going, nor could the *Concordia* move because of the vessels round her." Now, with respect to the vessels round the *Concordia,* there is not much evidence, except that there was ample evidence of there being vessels to the south. But with regard to the road from where the *Esther* was down to where the *Concordia* was at the time she starboarded her helm, there is evidence over and over again to the effect that that part of the way was clear, and that not only might the *Esther,* but the *Concordia* also, have pursued her course. It appears to be pretty well agreed upon all hands, that the distance between the *Esther* and the *Concordia,* when the *Esther* was first seen by the *Concordia,* was about a quarter of a mile; and the question is, whether the *Concordia* had then starboarded her helm. The fourth paragraph of the answer states, "Shortly before the screw-steamer *Esther* was observed, the helm of the *Concordia* was put hard a-starboard to avoid a barge." I admit, and I am bound to point out to you, there is a confusion in the evidence whether the *Esther* was seen antecedently to the time when the helm of the *Concordia* was put to starboard, or afterwards. Then it goes on to state, "the *Esther* was then noticed coming down the river about a quarter of a mile distant on the *Concordia's* starboard bow. If the *Esther* had kept her course there would have been no risk of collision, but the *Esther* would have passed well clear of the *Concordia,*"—not at all intimating that there was any sort of difficulty in the *Esther* keeping her course on the north side of the river,

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down towards the place where the *Concordia* then was. Then they state that "the *Concordia's* helm was accordingly kept hard a-starboard, but as she had very little way through the water, her head did not pay off considerably." Now, I apprehend this clearly means that after the *Esther* had been seen the *Concordia's* helm was kept a-starboard, there being no risk of collision from going on, "but as she had very little way through the water, her head did not pay off considerably." That appears to me to mean that at that time the *Concordia* proceeded with her helm hard a-starboard, but she had very little way through the water, and her head did not pay off considerably. Now that is directly in conflict with a great part of the evidence, which states that at that time she was not under way, but she was in point of fact drifting up the river bodily; and I feel bound to point out to you, with respect to that part of the evidence which goes to prove that the way to the north was perfectly clear at the time, and that the *Esther* might have gone down, that there is a very large preponderance of evidence that the road was clear from the place where the *Esther* was down to the place where the *Concordia* originally starboarded her helm. Now, if that were so, and if the *Esther* was aware that the *Concordia* was dead in the water, or nearly dead in the water, and unable to help herself, and if the *Esther* was capable of observing what the *Concordia* was doing and the position she was in, then, notwithstanding the rule was to port her helm, and notwithstanding the vessels might be end on, she would not be justified, of course, in porting her helm and running in upon the *Concordia*. I have spoken of the rule which applies where two steam-vessels are meeting end on. There is another article, the 14th, though I hardly know whether it applies on the present occasion, which says: "If two ships under steam are crossing so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other."

The case on behalf of the *Concordia* is that she was not moving at all, or not perceptibly moving, and was to be treated almost as if she were a vessel at anchor. What would be the state of the case supposing you were to be of opinion that those two ships were crossing so as to involve risk of collision, and that the ship on the

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starboard side should have kept out of the way, is for you to determine.

The Court of Trinity Masters retired, and on their return Dr. Lushington said the Court would take further time to consider the case.

Cur. adv. vult.

April 17. DR. LUSHINGTON. This case of the *Concordia* is one of damage, and it was argued before the Court, assisted by two Trinity Masters, on the 17th March. There was a French steamer, the *Esther*, going down the river Thames, and the *Concordia* was coming up the river. It appeared that these two vessels were approaching each other nearly end on, and the *Concordia* did not port her helm but starboarded it, contrary to the directions of the 13th article; and a justification for so doing was stated, and evidence was given on the part of the *Concordia* that she was prevented from complying with the regulations by reason that there were barges in the way which prevented her doing so, and that in truth her not porting her helm was to be attributed to the endeavour to avoid immediate danger under the provisions of the 19th article, which allows vessels, in order to avoid immediate danger, to depart from the rule in question. The real question was, whether the evidence was sufficient to establish such a prospect of immediate danger or not. I was of opinion there was not sufficient evidence, the onus probandi being upon those who averred that there was immediate danger. However, there was some doubt entertained whether that was so or not, and I deemed it most consistent with justice that time should be taken in order to deliberate upon that question. I desired the Trinity Masters to reconsider the case, and the result has been that my opinion has been confirmed. I therefore pronounce that the *Concordia* was to blame for the collision.

Proctors for plaintiffs: *Clarkson, Son, & Cooper.*
Proctors for defendants: *Toller & Sons.*

THE SPRING. 1866

Collision between two Sailing Vessels crossing—Sailing Rules, Articles 12, 18, 19. *July* 12.

The 12th article of the Sailing Rules (under 25 & 26 Vict. c. 63, s. 25) provides that, "When two sailing ships are crossing, so as to involve risk of collision, then, if they have the wind on different sides, the ship with the wind on the port side shall keep out of the way of the ship with the wind on the starboard side; except in the case in which the ship with the wind on the port side is close hauled and the other ship free, in which case the latter ship shall keep out of the way; but if they have the wind on the same side, or if one of them has the wind aft, the ship which is to windward shall keep out of the way of the ship which is to leeward."

Art. 18. "Where, by the above rules, one of two ships is to keep out of the way, the other shall keep her course subject to the qualifications contained in the following article."

Art. 19. "In obeying and construing these rules, due regard must be had to all dangers of navigation, and due regard must also be had to any special circumstances which may exist in any particular case, rendering a departure from the above rules necessary, in order to avoid immediate danger."

A collision took place between two sailing vessels crossing, the wind being about S.S.E., and the vessel C. steering about N.N.E., the vessel S. about W. by S.; the vessel C. did not "keep out of the way," but kept her course, and the vessel S., instead of keeping her course, ported her helm, alleging "immediate danger" as a reason for so doing:—

Held, that both vessels were to blame—the vessel C. for not having kept out of the way, in accordance with the provision in the last clause of the 12th article; and the vessel S. for not having kept her course, but having improperly ported her helm, there being no evidence of "immediate danger" to justify a departure from the 18th article.

COLLISION. This was a cause of damage brought by the owner of the late sloop *Constantine*, and the cargo laden on board of her, for a total loss occasioned by a collision with the *Spring*.

The petition stated, inter alia, that on the 14th March, 1866, the *Constantine*, a sloop of about twenty-three tons register, manned by the master, the mate, and a boy, left Treguier, in France, bound with a cargo of pigs for Plymouth. At about 8 A.M. of the following day, the *Constantine*, in the prosecution of her voyage, was about five miles S.S.W. of the Eddystone. The wind was blowing hard in squalls from S.S.E., it was high water, and the weather was thick and hazy with rain. The *Constantine* was steering N.N.E. with her mainsail close-reefed, and the boom over her port quarter, and a good look-out was being maintained on board of her. Under the aforesaid circumstances, a cutter, which proved to be the *Spring*,

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was observed by those on board the *Constantine*, at a distance of about a mile, bearing about four points on the starboard bow of the latter vessel, and was soon afterwards observed to be steering about W. by S. That the master of the *Constantine* kept the sloop on her course, and when the *Spring* approached her, waved to the latter vessel for her to pass under the stern of the sloop, but instead of so doing, the *Spring*, when within about two lengths of the *Constantine*, put her helm hard a-port, and very soon afterwards struck the bowsprit of the *Constantine* with great force. From the time when the *Spring* was first observed by those on board the *Constantine* until the time of the collision, the *Constantine* was kept on her course without the same being at all altered. The *Constantine* then made the best sail she could towards Plymouth Sound, the crew doing all in their power to save their vessel; but it was found impossible to keep the water under, and at about 1 o'clock P.M. of the same day the sloop sunk in deep water, and was totally lost, her crew having a short time previously saved themselves by getting into a boat which they had hailed.

The defendant by his answer alleged, inter alia, that the oyster cutter *Spring* of the registered burthen of thirty-six tons or thereabouts, manned by a crew of five hands all told, left Faversham at about 10 A.M. of the 12th March, 1866, bound for Falmouth, in ballast; at about 9 A.M. of the 15th of the said month the *Spring*, in the prosecution of her voyage, was about five miles from the Bolt Tail, which bore about N.E. The wind at such time was blowing hard from about S. to S. by E., the weather was thick with rain, and there was a heavy sea, and the tide was ebb, and of the force of about two knots an hour; and the *Spring* was on the port tack, steering W. by S., with the wind a little free, and was under double-reefed mainsail, reefed staysail, and fourth jib. Was proceeding at the rate of about four knots an hour. A good look-out was being kept on board her.

At such time a sloop, which proved to be the *Constantine*, was seen at the distance of about three miles from the *Spring*, and bearing broad on her port-bow. The *Constantine*, which was steering to the northward, had the wind aft, and was to windward of the *Spring*. The *Spring* was kept on her course in the expectation that the *Constantine* would get out of her way, but the *Constantine* ap-

proached and caused immediate danger of collision, whereupon the helm of the *Spring* was put hard a-port, but the *Constantine* with her bowsprit and stem struck the *Spring* on her port-bow just before the windlass, and sprung her bowsprit, and cut her down to the water's edge, and did her so much damage that her crew had the greatest difficulty in keeping her afloat and getting her into Falmouth, &c.

Evidence having been given vivâ voce in support of the above pleadings,

Milward, Q.C., and *Cohen*, for the plaintiff, contended that the case fell within the 12th article of the Sailing Rules, and that the *Spring* having been on the port tack, ought to have kept clear of the *Constantine*.

Dr. Deane, Q.C., and *E. C. Clarkson*, for the defendant, argued that the case came within the last clause of the 12th article; that the *Constantine* had the wind aft; was to windward of the *Spring*, and ought to have kept out of her way.

The Court and Trinity Masters retired, and on their return,

DR. LUSHINGTON said: We are of opinion that both vessels are to blame. I think it right, however, to state the grounds on which we have come to that opinion. I think the case of the *Constantine* falls under the last clause of the 12th article of the Sailing Rules: "if one of them has the wind aft, the ship which is to windward shall keep out of the way of the ship which is to leeward." I am of opinion, and these gentlemen agree with me, that the case of the *Constantine* falls under that head, and that that vessel was to blame. With respect to the *Spring*, I think the case falls under the 18th article: "Where one of two ships is to keep out of the way, the other shall keep her course," subject to certain qualifications. Now it is perfectly clear that the *Spring* did not keep her course, but ported her helm. In the answer it is pleaded that there was "immediate danger" when she ported; but, looking at the whole of the evidence, I cannot come to the conclusion that it was done in order to avoid immediate danger, and therefore we are of opinion that both vessels are to blame.

Proctors for plaintiff: *Tebbs & Sons.*

Proctors for defendant: *Toller & Sons.*

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July 31.

THE OBEY. LE GROS.

Collision—Limitation of Liability—Merchant Shipping Act Amendment Act, 1862 (25 & 26 *Vict. c.* 63), *s.* 54.

In a cause of limitation of liability, under the 54th section of the Merchant Shipping Act Amendment Act, 1862, arising out of a collision, the plaintiffs alleged that the collision occurred without their fault or privity. It was proved that the master, who was also part owner, of the vessel sued was on board at the time of the collision, but not on deck, the vessel being then in charge of the second mate and a coasting pilot:—

Held, that under these circumstances there was no obligation upon the master to be on deck; that the fact of his being part owner was no reason for charging the other owners with blame; and that the fact of his being on board at the time of the collision, was not in itself sufficient to shew that it occurred with his "fault or privity."

THIS was a cause of limitation of liability, brought by George Deslandes and Charles Le Gros, the owners of the barque *Obey*, against the owners of the vessel *Arthur* and her master and crew, the plaintiffs in a cause of damage, arising out of a collision which occurred on the 22nd of February, 1866, between the vessels *Obey* and *Arthur*.

The petition alleged that the plaintiffs were the registered owners of the British ship *Obey*, of the burthen of $271\frac{8}{100}$ tons, the plaintiff George Deslandes being the registered owner of 48-64ths, and the plaintiff Charles Le Gros being the registered owner of 16-64ths; that on the 22nd day of February, 1866, the *Obey*, whilst on a voyage from Monte Video to Leith, came into collision, off Lowestoft, with the British schooner *Arthur*, and in consequence of such collision the *Arthur* shortly afterwards sank; that at the time of the happening of the collision the *Arthur* was laden with a cargo, and had on board her divers effects belonging to her master and crew, and such cargo and effects were lost; that the *Obey* was also laden with cargo, and the plaintiffs are apprehensive that claims may be preferred against them in respect of damage caused to such cargo by reason of the collision; that on the 1st of March, 1866, a cause was instituted in this court, against the vessel *Obey* and her freight, by the defendants, the owners of the *Arthur*, and her master and crew, for the recovery of damages

in respect of the losses sustained by them respectively by reason of the collision, and bail was subsequently given in such cause, and the *Obey* released from arrest;

That the collision occurred without the actual fault or privity of the plaintiffs, or either of them;

That no loss of life or personal injury was caused by reason of the collision.

The plaintiffs admit, for the purposes of this suit, that in respect of the collision they are answerable in damages in respect of loss or damage to ship's goods, merchandise, and other things, to the extent provided by the 54th section of the Merchant Shipping Amendment Act, 1862; that is to say, that they are answerable in damages in respect of loss or damage to ship's goods, merchandise, and other things to an aggregate amount not exceeding 8*l.* sterling for every ton of the registered tonnage of the *Obey*, but they allege that such aggregate amount is insufficient to answer the claims of the defendants.

That no other action has been brought against the plaintiffs or the *Obey* in respect of loss occasioned by the collision, but the plaintiffs submit that, in case any other action or actions shall be brought against them or the *Obey*, in respect to damage or loss to ship's goods, merchandise, or other things occasioned by the collision, they ought to be at liberty, after any order shall have been made herein, to apply for and obtain from this Court an order restraining or staying such action or actions.

The defendants in their answer alleged that the collision did not occur without the fault or privity of the plaintiffs, or either of them; that at the time of the collision Charles Le Gros, one of the plaintiffs in this cause, was the master, and in command of the vessel *Obey*, whose owners are the plaintiffs in this cause; that the collision was occasioned by the fault or with the privity of the said Charles Le Gros.

The plaintiffs in their reply admitted that Charles Le Gros was at such time master of and on board the *Obey*, but said that at the time when the collision happened it was the said Charles Le Gros' watch below, and denied that the collision was occasioned by his fault or with his privity.

The portion of the 54th section of the Merchant Shipping Act

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Amendment Act, 1862, referred to is as follows: "The owners of any ship, whether British or foreign, shall not in cases where all or any of the following events occur without their actual fault or privity, that is to say,—1, where any loss of life or personal injury is caused to any person being carried in such ship; 2, where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board any such ship; 3, where any loss of life or personal injury is by reason of the improper navigation of such ship as aforesaid caused to any person carried in any other ship or boat; 4, where any loss or damage is by reason of the improper navigation of such ship as aforesaid caused to any other ship or boat, or to any goods, merchandise, or other things whatsoever, on board any other ship or boat; be answerable in damages in respect of loss of life or personal injury, either alone or together with loss or damage to ships, boats, goods, merchandise, or other things, to an aggregate amount exceeding fifteen pounds for each ton of their ship's tonnage; nor in respect of loss or damage to ships, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, to an aggregate amount exceeding eight pounds for each ton of the ship's tonnage; such tonnage to be the registered tonnage in the case of sailing ships, and in the case of steam ships the gross tonnage without deduction on account of engine room," &c.

E. C. Clarkson appeared for the plaintiffs.

Dr. Deane, Q.C., for the defendants.

The evidence of Charles Le Gros, the master, was to the effect, "that in the course of the voyage from Monte Video, he had put into Queenstown, where he engaged a coasting pilot; that about 8 P.M., when the *Obey* was off the Kentish Knock light-vessel, the second mate came up and took charge of the deck; that he, the master, then went below to rest, leaving the vessel in charge of the second mate and the pilot; that between the time of his going below and the collision, he was on deck two or three times; that he found on these occasions that the second mate and the pilot were attending to their duties; that at about 11 P.M. he was lying down in his cabin and hearing a noise on deck, he went on to the quarter-deck, and stepped from there on to the main-deck; that he

had no sooner done so than he saw the *Arthur* on the starboard bow, but too near to avoid a collision; that he sung out 'Down with the helm,' but it was too late, and the collision immediately took place."

Dr. Deane, Q.C., argued that it was the duty of the master to have been upon deck; that he ought not to have left the vessel in charge of the second mate; and that he was therefore "privy" to the collision.

E. C. Clarkson, contrà, cited *Wilson* v. *Dickson* (1); the *Volant* (2); and argued that the mere fact of the master not being on deck would not make him liable for the collision: *Nicholson* v. *Mouncey*. (3)

Dr. Deane replied.

DR. LUSHINGTON. I would take time to consider this case if I really felt any difficulty as to what is the true solution of the objections raised, but I confess I feel none. I am called upon to construe the 54th section of the Merchant Shipping Act Amendment Act; but, before I attempt to undertake that task, I will state the facts as I understand them from the evidence. I think it is unfortunate that this case, which is a proceeding to entitle the owners to immunity beyond a certain amount, should be left entirely upon the evidence of the master, who is one of the parties more particularly interested in the ultimate result; but I must take it as it stands. In the first place, I must consider whether there is any fault on the part of the master, looking at the state of the facts, and I will consider the question of privity afterwards. Now the master, in bringing this vessel from Queenstown to Leith, laden with a cargo, and under the circumstances set forth in the petition, takes the assistance of a coasting pilot. I apprehend that is a very common and ordinary precaution, and an additional precaution to a master who is navigating on a voyage of that description. Under the guidance of that coasting pilot he prosecutes his voyage after having passed Ramsgate, and certainly I cannot see that there was any obligation upon the master to be upon deck. Undoubtedly, he could not be exempted from that obligation, if it existed, by any fatigue he had undergone,

(1) 2 B. & Ald. 2. (2) 1 W. Rob. 385. (3) 15 East, 384.

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or any privations; but I do not agree with Dr. Deane's argument, that he was at all compelled to be upon deck. I apprehend that there is no rule or principle, that a master shall be bound to keep watch on a vessel of this description with such a crew—twelve hands; and the watch could be kept by the two mates on board—alternate watches—and it was the duty of the master to superintend both, and go on deck as occasion might require, and see that the vessel was properly navigated. I know of no authority whatever to say that a master must keep the watch. I know, if the first and second mate happen to be young men, and it is boisterous weather, then it is the duty of the master, whether the first mate is in charge or both are in charge, to be on deck to prevent damage, if damage can be prevented. I, therefore, do not think it necessary to say more than this, that there was in this case no obligation upon the master to be upon deck. He seems to have continued on deck for several hours, and entrusted the vessel to the second mate, assisted by the coasting pilot; and, unless the contrary be shewn, I must presume the coasting pilot was adequate to the duty entrusted to him. The master goes below, hears a noise, and the moment he hears it he goes upon deck; but it was then too late to do anything, because, according to his evidence, the other vessel was close under his bows. He gives an order of "Down with the helm;" but that order takes no effect—indeed, it seems to be impossible that it could at that moment, because the two vessels were in collision, and part of his evidence states that, as he gave the order, the two vessels were in collision, and nothing could be done on his part. Looking at these facts, I have no hesitation in coming to the conclusion that there was no fault on the part of the master; and to say that because the master is a part-owner you could charge the other owners with blame, would be contrary to all reason and principle, as it would be charging a person with that which he had no power to prevent.

The next question is, whether there is any privity. Perhaps there is some difficulty in that word; but, without laying down any precise rule which might govern other cases, the question is, whether there was any fault here to which it might be said the master was privy, according to the terms of the statute. It has been truly said, that in all probability this collision was either the

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fault of the second mate or the fault of the coasting pilot. It is probable because the parties have agreed to pay the damage, and have come here for a limitation. I think there is no evidence shewing that the master was at all privy, or that there was anything done by him which induced or brought about this collision. There might be most grievous misconduct in navigating the ship—the helm might have been put to starboard when it ought to have been put to port, or any other mistake might have been committed; but there is no evidence to shew that the master was privy to anything that took place. I do not think in this case I can make the master amenable to the exception in the act. I will not be tempted to say what I think may be the true meaning of the word "privity," but I am of opinion that the case, on the part of the plaintiffs, is established.

Proctors for plaintiffs: *Clarkson, Son, & Cooper.*

Proctors for defendants: *Deacon, Son, & Rogers.*

THE AALTJE WILLEMINA. JURREMA.

July 17.

Necessaries—3 & 4 *Vict. c.* 65, *s.* 6.

A claim for money advanced to a master to pay averages dismissed with costs, such advances not being "necessaries" within the meaning of the 6th section of the 3 & 4 Vict. c. 65.

THIS was a suit by Elkan Teller, for necessaries supplied to the ship *Aaltje Willemina.*

From the petition and the evidence of the plaintiff, it appeared that in April, 1866, the *Aaltje Willemina* was lying in the port of London, under the command of W. J. Jurrema, her master, and bound on a voyage to Bremer Haven; and that the master, being without funds for the necessary use of the ship, and without money or credit, applied to the plaintiff for the sum of 200*l.*, representing that he required the money to pay averages due from the vessel in respect of a collision which had occurred on a voyage from Sunderland to Oporto, and that until such payment was made the vessel could not proceed on her then intended voyage. The plaintiff then advanced the money, deducting 10*l.* for commission, and the

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master gave him a bill for 200*l.*, which had since been dishonoured.

Dr. Tristram appeared for the plaintiff.

E. C. Clarkson, for the defendant, the owner of the vessel.

DR. LUSHINGTON. It is well known that the Court has no jurisdiction as to claims for money advanced, unless it is perfectly clear that the money was to be applied for the purchase of necessaries to be supplied for the use of the ship or crew. This claim cannot come within the definition of "necessaries." I must dismiss it with costs.

E. C. Clarkson asked that the plaintiff might be condemned in damages.

DR. LUSHINGTON. The suit certainly ought not to have been brought: however, as there was no improper conduct, I am content to condemn the plaintiff in costs.

Proctors for plaintiff: *Brooks & Dubois.*

Solicitors for defendant: *Cattarns & Jehu.*

[IN THE HIGH COURT OF ADMIRALTY.]

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June 30.

BANDA AND KIRWEE BOOTY.

Cause of Booty of War—Actual Captors—Joint Captors—Right to begin—Jurisdiction—3 & 4 Vict. c. 65, s. 22—Principles of Distribution—Association—Co-operation—Right of Commander-in-Chief—General and personal Staff—Costs.

In a cause of booty of war, the *onus probandi* lies upon the parties claiming as joint captors as against the actual captors, and they are therefore entitled to begin.

The Court of Admiralty had no jurisdiction with respect to booty—property captured on land by land forces exclusively—until the passing of the 3 & 4 Vict. c. 65, the 22nd section of which, enacting that the Court "shall proceed as in cases of prize of war," must be understood to mean, not that in all respects the distribution of booty should be assimilated to that of prize, but merely that the ordinary course of proceeding in prize should be adopted.

No person will be entitled to share in booty on the sole ground of meritorious service, unless his claim is supported on the principle of joint capture: nor will the Court relax the principles of joint capture on the ground that part of the property captured was not strictly booty, or that the sum was of unusual magnitude.

All prize belongs absolutely to the Crown, which for the last 150 years, has been in the habit of granting it to "the takers," who are of two classes, actual captors and joint or constructive captors.

Joint captors are those who have assisted, or are taken to have assisted, the actual captors by conveying encouragement to them or intimidation to the enemy.

The union of the joint captor with the actual captor under the command of the same officer alone constitutes the bond of association which the law recognises as a title to joint sharing. Community of enterprise does not constitute association, and is equally insufficient as a ground for joint sharing, if the bond of union, though originally well constituted, has ceased to be in force at the time of the capture.

Such co-operation as will confer a title to a joint share of prize is also strictly limited to encouragement to the friend and intimidation to the enemy.

The distinctions between captures on land and captures at sea, tend to shew that in considering joint capture of booty, a wider application than is recognised in prize cases must be allowed to the term "co-operation;" concerted action on a vaster scale than is feasible at sea being indispensable to a campaign. The rule of sight, too, which prevails at sea is inapplicable on land.

The general rule for the distribution of booty, to be adhered to as far as possible, in accordance with naval prize decisions, is the rule of actual capture. In the case of an army consisting of several divisions, the line of distribution, in analogy to the rule of the naval service, and in conformity to military usage, will be drawn between division and division; that division to be regarded as the actual captor, any portion of which has captured the prize.

The association entitling to joint sharing must be military and not political,

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and must be under the immediate command of the same commander. The co-operation which is necessary as a title to joint sharing, is a co-operation directly tending to produce the capture in question. What tends to produce the capture cannot be once for all defined, but strict limits must be observed of time, place, and relation. Services rendered at a great distance from the place of capture, acts done long before the capture was contemplated, even though they affect the whole scene of operations, cannot be deemed such co-operation as will give a title to share in booty. Indirect services will be insufficient.

To entitle the commander-in-chief to share in booty, he must himself be in the field; but "to be in the field," it is not necessary that he should be actually present with the division that makes the capture; being in the field with one division, he is in the field with all.

But, if troops have been placed under the INDEPENDENT command of another, the commander-in-chief, though actually in the field, does not share in booty taken by those troops.

No distinction should be made in the right of the general and personal staff to share in booty; in principle, the right of both stands or falls with that of the commander-in-chief, therefore all his staff who are in the field with him are entitled to share.

Under the circumstances of the case, the costs of the rejected claimants ordered to be paid out of the fund.

THIS was a cause of booty of war, and arose out of the extensive military operations undertaken by the British government in India, for the suppression of the mutiny in that country during the years 1857 and 1858.

Three great military divisions were organised for this service. One of these divisions was placed under the personal orders of the commander-in-chief in India, General Sir Colin Campbell, afterwards Lord Clyde. Another division, consisting of troops from Bombay, took the field under the orders of General Sir Hugh Rose, afterwards Lord Strathnairn, and acquired the name of the Central India Field Force. The third division was drawn from the presidency of Madras, and was designated the Saugor and Nerbudda Field Force, by which the booty in question in this cause, amounting altogether to some 750,000*l.*, was captured at Banda and Kirwee, in April and June, 1858. This force was placed under the orders of Colonel, afterwards Major-General, Sir George C. Whitlock, K.C.B., and Bundelcund was their allotted sphere of service.

When the columns thus formed took the field, the immediate duty assigned to Lord Clyde and his forces consisted in the reduction of the rebellious North-Western Province of Oude, the rela-

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tive position of which to the Bundelcund territory will be seen from the map accompanying this report. But it is not necessary here to describe the military operations of Lord Clyde in the Oude territory, as those operations had no direct bearing upon the questions raised in this cause. On the south of Oude lies a narrow belt of territory called the Doab, situate between the rivers Ganges and Jumna; and Major-General Carthew had the command of a force operating in the Doab, to prevent the escape of the rebels of Oude into the more southerly territory of Bundelcund, and also to stop all communication between the revolters in those two regions.

The Madras division, under the name of the Saugor and Nerbudda Field Force, was specially directed against the rebels in Bundelcund. In March, 1858, the various corps of this force, after a march of 1300 miles, assembled at Dumoh, forty-six miles to the east of Saugor, under the command of Sir George Whitlock, who, in pursuance of express instructions sent to him by the governor-general, Lord Canning, advanced to Punnah and Chutterpore against two important rebel chiefs who were kinsmen as well as confederates in the revolt, Ali Bahadoor, the Nawab of Banda, and Narrain Rao, the Nawab of Kirwee.

On the approach of Sir G. Whitlock's division to Banda, Ali Bahadoor, at the head of a well-appointed force of 8000 men, horse and foot, with a numerous artillery, marched out to give him battle at Goeria Moeglee, about nine miles in front of the city; and it is sufficient here to state, that, in the action which ensued, Ali Bahadoor was signally overthrown by Sir George Whitlock's force.

This engagement has been called the battle of Banda, from which a portion of the booty in question in this cause resulted.

After this battle, the fugitives betook themselves rapidly to Kirwee, which lies at the distance of forty-five miles from Banda; and Narrain Rao, who was then in great force at Kirwee, was so intimidated by the result of the battle of Banda, that he made overtures of submission to Mr. Mayne, the political agent of the governor-general in those parts; and the submission, if accepted, would have terminated Sir George Whitlock's campaign. But Radho Gobind, the prime minister of Ali Bahadoor, was so deeply

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implicated in the treasonable revolt as to have been excluded by name from the general pardon issued by Lord Canning; and the intentions of Narrain Rao to make his submission were frustrated by his minister. Meanwhile, Sir George Whitlock was compelled by the numerous casualties and extensive sickness in his division, and by the excessively hot winds which then prevailed, to halt at Banda until he was reinforced by his second brigade, under Colonel McDuff, which was advancing by a more easterly route; and Narrain Rao, becoming aware of these delays and impediments to Sir George Whitlock's immediate advance, was induced to temporise. It became necessary, therefore, to prosecute the campaign; and Colonel McDuff's column having joined Sir George Whitlock on the 1st of June, 1858, the whole force, under Sir George Whitlock, moved rapidly forward upon Kirwee. On his approach, the rebel chief, Narrain Rao, marched out with a force of 9000 men to Burtkhoop, eight miles on the road to Banda, prepared to engage the British troops, which were advancing by two different routes. But as the British troops were in unexpectedly great force, the rebels abandoned their intrenchments without giving battle, and retreated to the Vindhiam range of hills, whence they subsequently carried on a desultory warfare with the British forces in the plains. Narrain Rao, however, when he thus retreated, was unable to carry off his treasures, and they were left behind at Kirwee.

After the retreat of Narrain Rao, Sir George Whitlock pushed forward to Kirwee, which succumbed without resistance, and he there made the great capture of booty in coin, bullion, jewels, artillery, and arms which gave rise to the present cause.

During the advance upon Banda and Kirwee, a portion of Sir George Whitlock's force was left at Saugor, under the orders of General Wheler, to assist in holding that position.

It is not necessary for the elucidation of the decision in this cause to enter into further detail of the military operations of Sir George Whitlock's division.

While Sir George Whitlock's division was thus performing the service allotted to them of quelling the insurrection in Bundelcund, the Bombay division, or Central India Field Force, in two columns, was carrying on operations in other territories within the same

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parallels of latitude. At a distance of more than 100 leagues on the west of Banda, General Sir Henry Roberts besieged and took the town of Kotah, a service which was especially eulogised by Lord Clyde, who, in one of the dispatches included in the evidence, described the captures of Kotah and Banda as two of the most brilliant achievements of the war. At a less remote distance, of fifty leagues on an average, Sir Hugh Rose was performing, about the same period of time, a series of important exploits, which had a most influential effect upon the objects of the war, in the regions of Central India which were formerly included in the Mahratta kingdom. At the end of January, 1858, Sir Hugh Rose, having previously captured the forts of Ratghur and Garrakottah, from which the rebel garrisons effected their escape by flight, broke up his camp at Saugor, and commenced a northward march into the territories of Jhansi and Gwalior, by the route of Marowra and Tehree. On the 1st of April, 1858, he fought, under the walls of Jhansi, the severe battle of the Betwa, and gained a great victory; immense slaughter being inflicted on the enemy. Five days afterwards he stormed Jhansi, where a well-equipped arsenal, numerous stands of arms, and a large amount of valuable treasure, fell into his hands as booty of war.

It is unnecessary to trace, in detail, the subsequent minor operations of the Central India Field Force. But on the 23rd of May, 1858, they fought another great battle with the great rebel leader Tantia Topee, in the ravines before Kalpee, of which the surrender was the immediate consequence. This was deemed a fatal blow to the rebellion in those regions, and the campaign of Sir Hugh Rose was considered to be at an end.

But Tantia Topee, immediately after his defeat at Kalpee, made a most unexpected movement by which he turned Sir Hugh Rose's left flank, and swiftly fell upon Gwalior, where the troops of Maharajah Scindiah, the greatest prince of Central India, and the most faithful native adherent of the British power, forsook him as soon as Tantia Topee appeared before the place, and joined the rebel leader with great promptitude. This operation of Tantia Topee was so serious a reverse to the British arms, that Sir Hugh Rose used the utmost exertions to recover Gwalior, and marched thither with great rapidity. Gwalior was successfully attacked, and, in the

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result, Tantia Topee was captured and hanged, and the rebel army entirely dispersed.

It was during this march of Sir Hugh Rose from Kalpee to Gwalior that Kirwee was entered by Sir George Whitlock's division. Gwalior was 200 miles west of Kirwee; and Sir Hugh Rose on the day of the surrender of Kirwee was at a distance of fifty leagues from that point, and in full march upon Gwalior, and increasing his distance every moment. The expedition of Sir Hugh Rose against Gwalior was not accomplished until a week after the surrender of Kirwee; and these circumstances are here noticed, because they bear very materially upon the questions of association, co-operation, and constructive assistance, to which the arguments in this cause were principally addressed.

On the ground of the importance of the services contributed by the Central India Field Force to the general objects and purposes of the war, Sir Hugh Rose and his division laid claim to a share in the captures at Banda and Kirwee.

The foregoing narrative of events is considered sufficient for a right understanding of the arguments of counsel for the various claimants and the elaborate judgment of the Court.

While Sir Hugh Rose's division was operating in Central India to the west of Sir George Whitlock's field of action in Bundelcund, another military force, under the orders of Major Osborne, a political agent of the governor-general, was operating in the territory of Rewah, on the east of Bundelcund. This was a force of small magnitude, though its services were not unimportant: and the Rewah Field Force was accordingly one of the claimants whose rights came under adjudication in the present cause.

A long correspondence had taken place between the prize agents of General Whitlock's force, who claimed the whole of the Banda and Kirwee treasure, by reason of being the actual captors, and the Lords of the Treasury, the result of which was that the matter was referred to the Judge of the High Court of Admiralty by an Order in Council, dated the 16th of June, 1864, made under the provisions of the statute 3 & 4 Vict. c. 65, the 22nd section of which enacts that "The High Court of Admiralty shall have jurisdiction to decide all matters and questions concerning booty of war, or the distribution thereof, which it shall

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please her Majesty, by the advice of her Privy Council, to refer to the said Court; and in all matters so referred the Court shall proceed as in cases of prize of war, and the judgment of the Court therein shall be binding upon all parties concerned."

The Order in Council was as follows:—"Whereas it has been represented to her Majesty that in the year 1857, a rebellion took place within that part of her Majesty's East Indian dominions known as Central India; that land forces, consisting of her Majesty's troops and of troops of the East India Company, were, for the suppression of the same, organized in three columns, termed respectively, the Central India Field Force, the Saugor and Nerbudda Field Force, and the Rajpootana Field Force, under the command respectively of Major-General, now General, Sir Hugh Rose, G.C.B., Major-General Whitlock, now Lieutenant-General Sir G. C. Whitlock, K.C.B., and Major-General Sir Henry Roberts, since deceased; and that in the course of the operations which followed, certain property was captured at the places undermentioned—namely, Jhansi, Kalpee, and Gwalior, by the force under the command of Sir Hugh Rose, of the estimated value of 4,90,000 rupees; at Kirwee and Banda, by the force under the command of the said Sir George Whitlock, of the estimated value of 70,00,000 rupees, and at Ahwah, Kotah and Buneos, by the force under the command of the said Sir Henry Roberts, of the estimated value of 1,82,000 rupees. And whereas the said property belongs of right to her Majesty in right of her Royal Prerogative. And whereas her Majesty has signified her gracious pleasure that the said property, and the proceeds thereof, shall be granted to and distributed amongst the forces concerned in the operations above referred to, in such manner as may be hereafter determined. And whereas it has been proposed for the consideration of her Majesty that the said proceeds of such property should be thrown into a common fund, and be distributed equally among the forces under the command of Sir Hugh Rose, Sir George Whitlock, and Sir Henry Roberts respectively. And whereas the prize agents of the force under the command of Sir George Whitlock have preferred a claim that the said property captured at Kirwee and Banda should be granted exclusively to the force under the command of the said Sir George Whitlock. And

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whereas the late General Lord Clyde preferred a claim on behalf of himself and his personal staff, that he and they should participate in the same, on the ground that he as commander-in-chief in India directed the operations which led to the capture thereof. And whereas the said Sir Hugh Rose has preferred a claim that he and the force under his command should also participate in the same, on the ground that such force co-operated in the actions or movements of the troops which led to the capture of the said property. And whereas Major-General Smith has preferred a claim for participation in the same, on behalf of himself and a brigade under his command, in the event of the claim of the force under the command of the said Sir Hugh Rose being allowed, the said Major-General Smith stating that the brigade under his command was detached from the before-mentioned force under the command of the said Major-General Sir Henry Roberts, and co-operated in the actions or movements of the force under the command of Major-General Sir Hugh Rose. And whereas a claim has also been preferred by Colonel William Middleton, on behalf of himself and a force under his command, known as the Futteypore Moveable Column, for a participation in the same property. And whereas other claims may be preferred by or on behalf of the same or other persons to the property, or some part thereof, captured during the aforesaid operations. And whereas, by an act passed in the fourth year of the reign of her Majesty, entitled "An Act to improve the practice and extend the jurisdiction of the High Court of Admiralty of England," it was enacted [see the section of the act above set out]. And whereas it is her Majesty's pleasure to refer under the authority of the said recited act all claims to share in the property captured during the aforesaid operations, and in the proceeds thereof, to the judgment of the High Court of Admiralty of England. Now, therefore, her Majesty is pleased to order, and it is hereby ordered, by and with the advice of her Privy Council, that the claims of all parties whomsoever to the property captured during the aforesaid operations, and to the proceeds thereof, be referred to the judge of the High Court of Admiralty of England, who shall take into consideration, if it shall appear to him necessary for the purposes of justice, any capture that may have been made of any property during the said

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operations by any of the claimants, and shall make such order as to him shall seem right, both in regard to the persons who are, and the proportions in which such persons are entitled to share therein, and to the costs and expenses incurred in relation thereto by the respective claimants, whether before or subsequently to this order, reserving however to her Majesty the right to direct the rates or scale of distribution according to which the said property, or the proceeds thereof, shall be paid to the several ranks of the force or forces to which such property shall be adjudged."

The commission to Lord Clyde, dated 11th July, 1857, was in the following terms:

"To our trusty and well beloved Sir Colin Campbell, Knight Grand Cross of the Most Honourable Order of the Bath, Lieutenant-General of our Forces, with the local rank of General in our Army in the East Indies, greeting. We, reposing especial trust and confidence in your prudence and loyalty, do by these presents constitute and appoint you to be commander-in-chief of all and singular our land forces serving in the territorial possessions of the East India Company during our pleasure. You are therefore carefully and diligently to discharge the said trust of commander-in-chief of our forces in the East Indies, by doing and performing all and all manner of things thereunto belonging. And we do hereby command all our officers and soldiers who are or shall be employed with our land forces in the East Indies, to acknowledge and obey you as commander-in-chief of our forces aforesaid; and you are to observe and follow such orders and directions from time to time as you shall receive from us, or from his Royal Highness the General Commanding-in-Chief our forces in our United Kingdom, &c."

The hearing of the cause was commenced on the 8th of January, and was continued during alternate weeks until the 28th of February, the arguments occupying the attention of the Court for twenty-six days.

The Attorney General (*Sir Roundell Palmer*), *The Queen's Advocate* (*Sir Robert Phillimore*), *Harris Prendergast*, and *A. S. Ayrton*, appeared for Sir George Whitlock and the military division under his command.

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Rolt, Q.C., Cotton, and *Vernon Lushington,* for Lord Clyde's executors.

Bovill, Q.C., Dr. Deane, Q.C., and *Vernon Harcourt,* for Sir Hugh Rose and the military division under his command.

The Solicitor General (*Sir R. Collier*), and *Pritchard,* for Major Osborne and the troops under his command.

Brett, Q.C., Cohen, and *Proctor,* for Major-General Roberts and the military division under his command.

Karslake, Q.C., and *Collier,* for Lieut.-Colonel Keating and his detachment.

Price, Q.C., and *Kemplay,* for Colonel Hinde and his detachment.

W. M. James, Q.C., Denman, Q.C., and *Bayford,* for Major-General Wheler and his detachment, and Major Graham Mayne.

The Admiralty Advocate (*Dr. Twiss, Q.C.*), and *Dr. Tristram,* for Captain Campbell.

Coleridge, Q.C., H. Bullar, and *E. C. Clarkson,* for Sir Michael Smith and his detachment.

T. Hughes for Sir A. Sterling and the personal staff of Lord Clyde.

Mellish, Q.C., and *J. Paterson,* for Major-General Carthew and his moveable column.

Cole, Q.C., and *Piffard,* for Colonel Norman and the general staff of Lord Clyde.

Fitzroy Kelly, Hume Williams, and *Charles Walker,* for Brigadier-General Maxwell and his moveable column.

Charles Pollock for Lieut.-Colonel Metcalfe.

Goldsmith for Sergeant Edward Moreton.

The evidence adduced by the parties in the cause, and referred to in the judgment, consisted of six printed volumes and a supplement.

Vol. I. Copies of official correspondence between the prize agents of the plaintiffs and the Lords of the Treasury, and between the latter and certain of the claimants, and presented to parliament 25th July, 1863.

Vol. II. Copies of official correspondence between the same parties, presented to parliament in 1864 and 1865.

Vol. III. Copies of correspondence, orders, and dispatches, addressed to the governor-general and commander-in-chief, by

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officers engaged in the suppression of the mutiny, and furnished by the military department of the India Office.

Vol. IV. Copies of correspondence of a similar nature to the contents of Vol. III., furnished by the political department of the India Office.

Vol. V. Copies of references to dispatches in the *London Gazette*, 1857—8; extracts from a narrative of events of the governor-general; and returns of papers relative to the mutiny in India.

Vol. VI. Copies of extracts from returns relative to the mutiny in India; and also copies of correspondence relating to Lord Clyde's memorandum, including the supplementary communications between the prize agents of General Whitlock's force and certain of the departments of state.

The supplement consisted of extracts similar to the foregoing, and of affidavits by Major Clifton and others.

The evidence for the defendants consisted chiefly of reports and dispatches, addressed to the governor-general and commander-in-chief in India, by various persons engaged in suppressing the rebellion, and of affidavits by some of the parties in the cause.

The following discussion took place as to the right of the plaintiffs, as such, to open the case: (1)

The Attorney General. This case is sui generis in this respect, that it is the first case of military booty that has been referred to the Court at all under the act of parliament; and it is also sui generis in another respect, instead of a simple question between the actual captor, on the one side, and persons claiming to be captors, on the other, there are a very large number of defendants who cannot be reduced into less than ten or eleven distinct cases, all of which depend upon the view which may be taken of the effect of each of the various operations in the general design which is alleged to have existed. The right, primâ facie, belongs everywhere to all plaintiffs to open their case to the Court; and if it were denied in this instance, every one of the defendants would have in the first instance to open his case, and the plaintiff to

(1) The shorthand writer's notes of the arguments were printed de die in diem, a complete set of which is in the possession of each of the counsel and solicitors engaged in the cause.

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answer at least eleven cases at once; and then, after the plaintiff had been heard, there would be eleven replies at least. In principle and in point of convenience, the justice of the case and the time of the Court would be consulted by the plaintiff opening his case, dealing with it upon the merits, which are as much known upon the present occasion to one party as to another, and a single reply would follow from the plaintiff in the usual manner. There is no rule of practice applicable to this Court at all which can in the slightest degree interfere with it. Prize cases are not precedents for this purpose, nor is the *Deccan* case (1), for in that there were only one plaintiff and one defendant.

[DR. LUSHINGTON. There were more parties than those in the *Deccan* case.]

The only parties heard besides those mentioned were the East India Company, but they claimed not as captors, but on quite a distinct footing. It would, under the circumstances of this case, be a positive injustice to the plaintiff under the pretence of recognising in him a primâ facie right (because he is admitted, at all events, to have some interest) to deprive him of the usual rights of plaintiffs in all courts to make out their own case, and to have a general reply.

Rolt, Q.C. It is not in all cases the rule that the plaintiff begins; those upon whom the affirmative of the issue is thrown are the parties who have to begin. They are usually the plaintiffs; but in the present case the issue clearly rests upon the defendants to establish that they are entitled to share with Sir George Whitlock's column in the booty taken at Banda and Kirwee. If they were not to begin, it would be utterly impossible, the plaintiff's title being admitted, that he should meet the points raised by the defendants. We rely, first, upon the universal practice, and next, upon the fact that the universal practice is consonant to the convenience and justice of the case. There is no case in which an actual captor, claiming the whole of the prize, and claiming to exclude some portion of the fleet, has actually begun; but, to use an expression more or less accurate, the constructive captors always begin.

The Solicitor General. The claim of the actual captors is as

(1) See the report of this case in two quarto volumes in the Lincoln's Inn Library.

distinctly admitted here as it could be in any case, for no one disputes that Sir George Whitlock's forces did actually take the booty. Then we who appear for the different parties say that we are entitled as constructive captors. This case is therefore no exception to the rule that the joint captors, on whom the onus probandi lies, should begin. Otherwise the plaintiff will have, in a great measure, to prove a negative.

DR. LUSHINGTON. It was impossible for me to have read these papers without anticipating that, in all probability, this very question would arise, and that I should have, in the first instance, to determine what course was best to adopt in order to attain the great end that is in view—namely, the due administration of justice.

Now, the determination of the Court depends partly upon what has been the established practice in questions of this description, and partly upon the consideration of upon whom the onus probandi lies, and lastly, upon what course will be best to attain the ends of justice.

With regard to the practice, there has been no practice, so to speak, with respect to booty taken on land. There has been an established practice with respect to all vessels which have been captured at sea, and with respect also to conjoint operations of the navy and the army. In both these cases, without any exception, the rule has been that those who claimed to share in the joint capture began to state their case, and afterwards were entitled to reply. I believe that no instance can be brought forward either in the Court of Admiralty or in the court of appeal in which this course was not pursued. If, therefore, practice is of importance, practice would induce me to adopt the course which has been followed in so large a number of instances.

With regard to the onus probandi, and to the fact that upon the present occasion the actual captors are the plaintiffs, in truth and in fact they are plaintiffs in name only, and not in fact and in reality; they are made plaintiffs upon the present occasion for the very purpose of calling into the arena those persons who might have set up a claim to the booty in question. I do not know that this was precisely the best course which could have

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been pursued. Another course might have been pursued had it been deemed necessary so to do, but it was clearly the most expedient.

Now, with regard to the onus probandi, I apprehend that whenever the onus probandi is fixed upon a party, it is the duty of that party to begin and to produce proof in order to establish his case. There is no onus probandi upon the Attorney General's party; they are the actual captors, and unless another case can be made out which shall shew that other parties are entitled to share with them, they are entitled to take the whole of the booty. Now, according to my knowledge, and so far as I can pretend to give an opinion upon the subject, in all cases appurtenant to the present, where the onus probandi has been imposed upon a party they are entitled to begin, in order to fulfil that duty. Nay, I believe it has gone so far as this, that even in cases where the onus probandi in the original instance did not attach upon a party, yet if, in the course of the proceedings, the onus probandi shifted and did attach upon a party, then in that case they were bound to produce the evidence. If my memory does not fail me, I think that even in the great trial in the *Deccan* case, that was the principle that was adopted. And looking at all these matters, it appears to me, with regard to the Attorney General's proposition, that although it is true that much inconvenience might be avoided, and much probable delay might be saved, yet that it militates both against practice and against principle. And I apprehend that it is my duty, whatever may be the time which this case may occupy, whatever labour the Court may have to undergo, to choose that course which is most adapted to attain the ends of justice, and most consonant with past practice. Therefore, the proper course will be for the other claimants to begin.

Some further conversation then ensued, the result of which was that the Court allowed two counsel to be heard for each of the defendants, and three for the plaintiffs.

The grounds on which the various defendants claimed to share in the booty will be found so fully discussed in the elaborate judgment of the learned judge, that it would only entail needless repetition to set out the arguments at any length; while, on the

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other hand, to condense them within reasonable limits would be to render them almost unintelligible; the more so, as they were based upon long extracts from the military and official correspondence, orders, and dispatches contained in the volumes above mentioned. For the purpose of this report, therefore, the following summary has been deemed sufficient. (1)

On behalf of the personal representatives of Lord Clyde, it was submitted, as a proposition without exception, founded upon principles of equity and justice, and upon the usage in cases of booty taken by armies, and upon the principles settled in the Naval Prize Court, that a commander-in-chief is entitled to share in all booty taken by all the divisions of the army operating within the territorial limits of his command, or employed under his orders on expeditionary services beyond those limits, and that applying that principle to Lord Clyde's case, if it were found that his lordship was actually in the field; that the operations and movements which resulted in the captures were part of a series of combined operations planned or superintended from the first by his lordship, as commander-in-chief of all India; that the commanding officer of the Madras division, which took the booty in question, acted in subordination to his lordship as his commander-in-chief; and that Lord Clyde, in fact, directed or controlled every movement of troops, and every essential part of the campaigns, in the different fields of operation, there could be no doubt of the title of Lord Clyde, as commander-in-chief of all India, to share in the booty which was the direct result of his military skill and of his position and responsibility as commander-in-chief. By the terms of Lord Clyde's commission (2), he was commander-in-chief of all the land forces serving in the territorial possessions of the East India Company, and all officers and soldiers were to acknowledge and obey him as commander-in-chief. It was, therefore, contended on his part that there could be no pretence for the argument that, with respect to the duty at Banda and Kirwee, Sir G. Whitlock held a command independent of Lord Clyde. Everything done

(1) Mr. Harris Prendergast, to whom the reporter is indebted for many valuable suggestions while preparing this report, is about to deposit his copy of the printed arguments, comprised in a folio volume of 1150 pages, in the Library of Lincoln's Inn.

(2) See the commission set out, ante, p. 117.

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by General Whitlock was the result of the military skill and strategical plans of the commander-in-chief. General Whitlock never had an independent command, nor was there any evidence to shew that such an imperium in imperio ever existed.

In support of the proposition that the commander-in-chief was entitled, according to principle and naval analogies, to share in all the booty taken by every division of the force under his command or control, the following authorities were cited: *The Dolores* (1); *Lord Nelson* v. *Tucker* (2); *Harvey* v. *Cooke* (3); *The San Antonio* (4); *The Tarragona Booty* (5); the case of *Sir T. Hislop*. (6) On the part of Lord Clyde's general and personal staff, it was submitted as well established, that the general and personal staff were entitled, by military usage, to share according to the rank of their respective military commissions, in all booty in which the commander-in-chief was entitled to participate.

On behalf of all the other defendants claiming in opposition to the actual captors, it was contended that there was such a general combination, strategical co-operation, association, and unity of purpose among all the forces engaged in the suppression of the rebellion, that all were really engaged in one and the same work, and that all the armies or divisions of the army in the various fields of operation were, therefore, collectively and in just construction, captors of all the booty taken at Banda and Kirwee, as well as in the districts to which they were specifically attached; that but for the successes of Sir Hugh Rose and the other commanders, General Whitlock's operations in his own field of duty could not have been effectively conducted; further, that the claims of the defendants were to be decided upon the broad grounds of justice and equity, for the recognition and remuneration of military successes and achievements of the most meritorious description, and without regard to the more narrow precedents and principles which regulate the claims of naval captors.

Shortly after the conclusion of the arguments, the learned judge was supplied, at his request, with copies of the commissions issued to the Marquis of Hastings and his several successors holding the office of commander-in-chief in India.

(1) 2 Dods. 413. (2) 4 East, 238. (3) 6 Ib. 220. (4) 5 C. Rob. 209.
(5) 2 Dods. 487. (6) The *Deccan* case, 2 Knapp. 105, 114, 127.

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On behalf of the actual captors, Sir George Whitlock and the officers and men of the Madras column, it was argued that the Court was not to create precedents, but to apply rules and principles already laid down: the *Naples Grant.* (1)

As to the claim on the part of Lord Clyde: the effect of all the cases was, that the commander-in-chief, if not commanding the particular force in the field, does not take the commander's share. He does not take it if he remains at the headquarters of his residency, where he continues to exercise the official superintendence belonging to his office of commander-in-chief; nor does he take it if he takes the field with a different army. He takes it only if he is commanding the particular army personally and immediately in the field; that Lord Clyde never was commander-in-chief in the field in which the divisions of Sir Hugh Rose and Sir George Whitlock operated; but that he took the field in person, and placed himself at the head of a particular division of the army—that in Oude; and that he was in the position only of an officer having a separate command; that as to the actual captors, all the authorities concurred that the doctrine of constructive capture was not to be extended, and that the principle of actual capture was to be adhered to as closely as possible; the actual captor was always favoured (2): that General Whitlock, in fact, held an entirely independent command, as was manifest from the instructions issued to him from the military department of the presidency of Madras:

EXTRACT

From the Military Consultations of the Government of Fort St. George, 8th December, 1857.

(No. 267.)

From the Adjutant-General of the Army, 7th December, 1857, No. 1525, to the Secretary to Government, Military Department.

I have the honour, by order of the commander-in-chief, to forward for submission to the right honourable the governor in council, the accompanying copy of letter of instructions addressed on the 17th ultimo, to Brigadier-General Whitlock, Commanding Field Division.

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(1) 2 Dods. 273.

(2) See Bynkershoek; Quæstiones Juris Publici (edit. 1752), Lib. i. cap. 4. "In bello capta ejus sunt, qui primus eorum possessionem nactus est," &c. and Lib. i. cap. 18, "Non quærimus, quamobrem capta vel dedita sit navis, sed quis occupaverit," &c.

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To Brigadier-General G. C. Whitlock, 17th November, 1857, No. 6064.

The commander-in-chief being desirous that the force about to be employed in the disturbed Saugor and Nerbudda districts should be commanded by an officer, in whose judgment, intelligence, and ability, perfect confidence can be placed, and believing you to possess these qualifications, has been pleased to select you for the duty in question, with the rank of brigadier-general.

2. Your command will be independent of the officers commanding the divisions or districts through which you may pass: you will receive your instructions direct from, and make your reports direct to, army headquarters.

3. Your sense of what is due to a senior officer will dictate to you the courtesy to be shewn to a superior within whose command you may be.

4. The movement of your division will be made under the orders which you will receive from the quartermaster-general of the army.

5. It is scarcely necessary to remind an officer of your experience that, while it lies within the province of political authorities to intimate the points in which the exhibitions of force may be required, it rests solely with the chief military authority, after having obtained full information from the civil authorities with respect to the nature of the enterprise, the force likely to be opposed, and the nature of the country, in which the troops are to be employed, to determine on the strength and description of troops to be sent, and to make all the military dispositions which circumstances may call for, and Lieutenant-General Grant feels confident you will keep in your own hands the authority with which you are invested by your position.

As to the association contended for on the part of the defendants, that there was one great design, and that the whole was a plan of which there were two different parts, but that all were really engaged in the same work, and all really and truly the captors of all the prizes taken, such a vague general notion of association was totally contradicted by the authorities, which shewed that there must be a strict unity tending to the particular service out of which the capture resulted; but where the commanders and forces were distinct, and the services separate, there was never such an association as entitled one service to participate in the captures made by the other. *The Guillaume Tell* (1); *The Arthur* (2); *The Forsigheid* (3); *The Stella del Norte* (4); *The Island of Trinidad* (5); *The Nordstern* (6); *The Vryheid* (7); *The Mars.* (8)

That this was a case of mutiny and insurrectionary war, of danger and disturbance in almost every part of India, and therefore had not the ordinary character of most wars, that of bringing con-

(1) Edwards, 6.
(2) 1 Dods. 423.
(3) 3 C. Rob. 311.
(4) 5 C. Rob. 349, 351.
(5) 5 C. Rob. 92.
(6) 1 Acton, 128.
(7) 2 C. Rob. 22.
(8) 2 C. Rob. 22, note.

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centrated forces into the field, so that by the general engagement of large armies the fate of the war should be decided. Nor did it depend upon the capture of particular places, but the enemy was almost everywhere to be found. The political circumstances of the particular country in which the forces were to operate did not require a large combined army, but moveable field forces, separate and distinct from each other, able to act with independence upon a great variety of points, but with the power of combination and union, if necessary.

That those, therefore, who had to form the general plan necessarily took into account all the exigencies of the war throughout the whole of India; and that throughout all the operations, the military power in India was subordinate to the political power. The plan was not that of the commander-in-chief, but of the government at Calcutta. The Doab, Oude, and Rohilcund were the limits of Lord Clyde's operations; and there was not the slightest trace of his assuming or exercising the authority of commander in the field anywhere else. The orders given to Sir George Whitlock during the whole campaign were either given by the political authority alone, or by the military in communication and concert with the political authority; and Lord Clyde was only the military organ of the communications, exactly in the same way as if he had never stirred from Calcutta. That the political authority alone regulated Sir G. Whitlock, and Lord Clyde's position was only that of an official commander-in-chief, at the head of the military department of the state, exercising official authority and superintendence over an army not under his immediate or personal command, but under that of the person with whom he communicates, and though Sir George Whitlock reported to the commander-in-chief, he reported to him only as official commander, and for the information of the combined political and military authority.

That as to Lord Clyde's staff, the *Deccan* case shewed that a general commanding an army in the field, having a certain staff by whom he is assisted, is supposed to take his staff with him wherever he is present, and as he is constructively present with every division in the field, his staff shares upon being in the field; when he shares they share, and in no other case.

That as to the alleged co-operation of Sir Hugh Rose (in re-

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lieving Saugor, in capturing Garrakottah), it was not such intimidation and encouragement as would entitle one officer or the person who does one service, to participate in the prize of another: *The Dordrecht* (1); *The Cape of Good Hope* case (2); *The Santa Brigada* (3); *Le Niemen.* (4) There was no actual combination, such as would entitle Sir Hugh Rose to share.

That as to the doctrine of sight, though it was not strictly applicable to cases on land, yet the principle, that of co-operation by encouragement and intimidation, might be applied in another way; even in maritime cases there were exceptions to the rule of sight, where the circumstances disproved the animus capiendi as to the particular capture: *The Galen* (5); *The Buenos Ayres* case. (6) In this case the other forces were moving for other objects in another direction, and never had the slightest intention towards the particular point at which the capture was made. Communication could not stand instead of sight: *Le Bon Aventure.* (7)

That as to Sir H. Roberts's claim, he was not shewn to have been in communication with Sir G. Whitlock, but said that his force was incorporated with Sir Hugh Rose, but such a derivative title through one who claims as a constructive captor could not be admitted.

That as to the case of General Wheler, he never co-operated with Sir George Whitlock at a single point; all he did was to occupy Saugor, through which Sir George Whitlock marched en route to Banda. But the naval cases shewed that even where there has been an association of a squadron together, yet a ship detached for a distinct purpose would not share.

That the same doctrine would apply to Colonel Keating's and to Major Osborne's cases.

That as to the forces of General Carthew and General Maxwell, their duties were to patrol up and down the Doab, and not to co-operate to the south of the Jumna, which they were expressly ordered not to cross.

That the Court would, therefore, in compliance with the directions of the Order in Council, "to make such order as to him shall seem right," act, not secundum arbitrium boni viri, but in accord-

(1) 2 C. Rob. 55. (2) 2 C. Rob. 274. (3) 3 C. Rob. 55. (4) 1 Dods. 9, 16, 17. (5) 2 Dods. 24. (6) 1 Dods. 29. (7) 1 Acton, 211.

ance with the principles of previous decisions upon naval capture, which had been founded upon grounds of justice and judgment, as elaborated from a knowledge of the service performed, and of the laws and customs of war and of the practice of the service.

The counsel on behalf of the defendants replied.

Cur. adv. vult.

June 30. DR. LUSHINGTON delivered judgment.

I am very sensible of the great responsibility imposed upon this Court, in having to adjudicate on the many conflicting claims preferred by officers on behalf of themselves and the troops under their command, to share in the booty which her Majesty has been graciously pleased to grant. On this point I will only say that I have given the subject my best attention, with an anxious desire to do what is right. Judgment.

Some preliminary observations are necessary with regard to the circumstances under which this case comes before the Court.

The Court of Admiralty has no original jurisdiction in prize matters; the jurisdiction which it exercises is derived from the authority of parliament and the royal prerogative. At the outbreak of a war requiring the services of the navy, it has been customary for the Crown to issue a proclamation, bestowing the proceeds of maritime captures upon the takers, and at the same time to issue a commission, requiring the Lords of the Admiralty to empower the Admiralty Court "to take cognizance of, and judicially proceed in matters of prize," and "to hear and determine the same according to the course of Admiralty and the law of nations." Some permanent provisions on this subject have been lately made by "The Naval Prize Act, 1864." Jurisdiction.

But with respect to booty—property captured on land by land forces exclusively—the Court of Admiralty had no jurisdiction until the passing of the 3 & 4 Vict. c. 65, the 22nd section of which provides that:

> The High Court of Admiralty shall have jurisdiction to decide all matters and questions concerning booty of war, or the distribution thereof, which it shall please her Majesty, her heirs and successors, by the advice of her and their Privy Council to refer to the judgment of the said court; and in all matters so referred the Court shall proceed as in cases of prize of war; and the judgment of the Court shall be binding upon all parties concerned.

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This statutory provision has been put in force for the first time on the present occasion. Difficulties having arisen as to the distribution of certain property captured during some of the operations for suppressing the Indian mutiny, it was thought advisable that a reference, under the authority of the statute, should be made to this court, and accordingly on the 10th day of June, 1864, an Order in Council was issued for the purpose. The recitals in the Order are to the following effect:

That in the year 1857 a rebellion took place within Central India: that land forces, consisting of her Majesty's troops, and of troops of the East India Company, were, for the suppression of the same, organised in three columns, termed respectively the Central India Field Force, the Saugor and Nerbudda Field Force, and the Rajpootanah Field Force, under the respective commands of Sir Hugh Rose, Major General Whitlock, and Sir Henry Roberts, since deceased; that in the course of the operations which followed certain property was captured at the places under-mentioned, viz. at Jhansi, Kalpee, and Gwalior, by Sir Hugh Rose's force, of the estimated value of 4,90,000 rupees; at Banda and Kirwee, by Sir G. Whitlock's force, of the estimated value of 70,00,000 rupees; and at Ahwah, Kotah, and Buneos, by Sir H. Roberts' force, of the estimated value of 1,82,000 rupees: that the said property belonged to her Majesty in right of her royal prerogative: that her Majesty had signified her gracious pleasure that the said property and the proceeds thereof should be granted to and distributed amongst the forces concerned in the operations above referred to in such manner as might be thereafter determined: that it had been proposed for the consideration of her Majesty, that the said proceeds of such property should be thrown into a common fund, and be distributed equally among the forces under the command of Sir H. Rose, Sir G. Whitlock, and Sir H. Roberts, respectively: that the prize agents of Sir G. Whitlock's force had preferred a claim that the property captured at Banda and Kirwee should be granted exclusively to that force: that claims to participate had been preferred by the late Lord Clyde as commander-in-chief, on behalf of himself and his personal staff; by Sir Hugh Rose, on the ground of his force having co-operated in the actions or movement of the troops which led to the capture; also by Major-

General Smith and by Colonel Middleton: that other claims might be preferred by or on behalf of the same or other persons to the property or some part thereof captured during the aforesaid operations.

Then the statute, 3 & 4 Vict. c. 65, s. 22, is recited, and then comes the Order itself, which is in these terms:

Now, therefore, her Majesty is pleased to order, and it is hereby ordered, by and with the advice of her Privy Council, that the claims of all parties whomsoever to the property captured during the aforesaid operations and to the proceeds thereof, be referred to the judge of the High Court of Admiralty of England, who shall take into his consideration, if it shall appear to him to be necessary for the purposes of justice, any capture that may have been made of any property during the said operations by any of the claimants, and shall make such order as to him shall seem right, both in regard to the persons who are and the proportions in which such persons are entitled to share therein, and to the costs and expenses incurred in relation thereto by the respective claimants, whether before or subsequent to this Order, reserving, however, to her Majesty the right to direct the rates or scale of distribution according to which the said property or the proceeds thereof shall be paid to the several ranks of the force or forces to which such property shall be adjudged.

The first question then is, what are the general principles upon which my decision is to be founded? On this the statute is silent; it merely provides that "in all matters so referred the Court shall proceed as in cases of prize of war;" which I understand to mean, not that in all respects the distribution of booty should be assimilated to that of prize, but simply that the ordinary course of proceeding in prize should be adopted.

But I have been invited by some of the counsel to decide the conflicting claims upon what has been called the broad principle of justice and equity, that is, to lay down once for all a new code of rules of joint capture according to my own discretion, irrespective of precedent and practice. I disclaim having any such authority; such is not my task; my duty, I apprehend, is to make a judicial, not an arbitrary, decision. If my jurisdiction is new, the subject of joint capture is old. I have to ascertain the true principles on which claims to joint capture depend, in order to apply those principles to the special circumstances of the warfare now under consideration; and in doing so I am not at liberty to treat the subject as a tabula rasa, and to shut my eyes to all that has been done in past times in the naval and military services. I am

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bound, not only to exercise my own reasoning on the subject matter, but to borrow all the light I safely can from the decisions in cases of prize, and from the usage in grants of booty. I say safely, for there are limits which will be presently considered.

In the meantime the position I have taken, that it is my duty to form a judicial decision upon the principles of joint capture, enables me to dispose of certain preliminary points. In the first place then, I disclaim altogether the right of assigning to a person a share in this booty on the sole ground of meritorious service. Unless his claim is supported upon the principle of joint capture, I must decline to entertain it, however great may be his merit, however splendid his achievement, however severe his sufferings. It would not be possible to prescribe bounds to the admission of claims founded upon such extraneous grounds, or, admitting them, to observe any practice consistent or satisfactory.

For the same reason I must reject the argument that in making the award the Court should relax the principles of joint capture, on the ground that part of the property captured was not in its nature what is strictly called booty. Of the fact I have not very precise evidence, but the property taken from those who joined the mutineers may have consisted of three kinds: property of British subjects, which is strictly speaking forfeited property; property of subjects of dependent states; and property of subjects of independent states. But whatever the fact may be, I deem it of no importance. I must consider the whole as booty, as property captured on land by land forces. I feel confident that as such it has been committed to my jurisdiction.

For the same reason, too, I place out of consideration the magnitude of the booty in the present case. That cannot affect the mode of distribution. The principles of joint capture must be the same, whether the sum be small or large.

Further, the reference being to my judicial decision, I have deemed it my duty to form my judgment independently of all that took place relative to the distribution of this booty before the matter came to this court; independently, that is, not only of statements advanced post litem motam by any of the claimants, however distinguished, but also of the various opinions expressed by the high authorities, civil and military, who previously had the

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subject under their consideration. If in this judgment I should differ from any of such opinions, it will be without the slightest disrespect to those who pronounced them. It must be remembered that I have had superior means of forming a judgment. The whole of the facts have been before me, and I have had the advantage of the ablest arguments on all sides.

Prize decisions and grants of booty, how far an authority.

Joint capture has been recognised both in decisions on naval prize and in grants of military booty. One of the most important matters in this case is to determine what effect those decisions and grants ought to have upon the judgment of the Court.

First, then, as to the naval decisions. I do not consider that I am to be absolutely governed by any decision in naval prize. Those decisions are not properly precedents, that is, judgments by a competent Court possessing the same jurisdiction as myself, and consequently commanding the course I should pursue. But be it not supposed that I shall disregard those decisions altogether. On the contrary, I think them of great value, if properly used, if used, that is, to illustrate the general principles applicable to the distribution of property taken from the enemy. All I wish to insist upon is, that there is an essential distinction between naval prize and booty from the fact of the one capture being on land and the other at sea. This is a distinction pervading every case. The particular way in which the distinction operates I shall be in a better position to explain after I have reviewed the naval decisions, and stated their result.

Then as to grants of booty made by the authority of the Crown, and grants of money through parliament, made though no booty or none of the same value has been captured,—all booty belongs to the Crown; the Crown disposes of it amongst the troops engaged as the advisers of the Crown may think fit to recommend. This was always the case; it is now expressly laid down by the statute (2 Wm. 4, c. 53) regulating the payment of army prize money, the 2nd section of which prescribes—

That from and after the passing of the act, in all captures which shall be made by his Majesty's army, royal artillery, provincial, black, and all other troops in the pay or service of his Majesty, or belonging to his Majesty, but in the pay of the United Company of Merchants trading to the East Indies, or howsoever otherwise paid, of any fortress or possession of his Majesty's enemies, or of any ship or vessel in any road, river, haven, or creek belonging to such fortress or

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possession, and in all captures, expeditions, or actions from which prize money, bounty money, or grant shall arise, the commanders and other officers and soldiers engaged therein shall have such right and interest as his Majesty shall think fit to order in all the arms, ammunition, stores of war, goods, merchandise, booty, prize, and treasure belonging to the state, or to any public trading company of such enemies, which shall be found in such fortress or possession, or captured in or granted for any such expedition or action, to be divided in such proportions, and according to such general rule of distribution for the army as shall be established by his Majesty, or in default thereof, in such manner as his Majesty, under his sign manual, shall be pleased to direct.

What troops are to be considered as the troops that have been engaged in the capture, expedition, or actions whence the prize money has arisen, and, therefore, as the troops in whose favour the grant is to be made, is a question on each occasion for the Treasury, who usually take the advice of one of the law officers of the Crown. No grant has ever been framed by a legal tribunal. Decisions as to booty in the proper sense of the term there are none, and can be none, for booty has not till now been subject to any jurisdiction. The Lords of the Treasury are bound by no law whatever, nor are they as a body competent to say what is a precedent or not. But though this is so, these grants may, when examined, disclose a course of usage in the distribution of booty which ought to command the attention of the Court.

Naval prize. Actual captors.

It would, I think, be very difficult, and would serve no practical purpose, to explore the ancient history of prize law. It is sufficient to start from the proposition, which is both ancient and indisputable, that all prize taken in war belongs absolutely to the Crown; and that, for certainly a century and a half, the Crown has been in the habit of granting the prize, after condemnation, to "the takers."

The purpose of the Sovereign, ceding prize to the takers, may have been originally to reward successful valour. But captures are made under all circumstances, and by the nature of the case are as often the result of careful vigilance or even fortuitous finding as of actual combat; and accordingly the system of ceding prize to the takers is not limited, either in purpose or effect, to this primary object, the rewarding successful valour. It may now, I think, be regarded as providing a stimulus to the performance of every kind of duty, by furnishing certain gratuities as incidental to certain services. Another result of the cession of prize, and that by no means unimportant, is, that it restrains pillage. That pro-

perty captured at sea should be preserved intact is to the interest of all parties: of neutral and friendly powers, that, if not prize, it may be restored; and of the captors, that, if prize, it may be legally distributed.

Who, then, are "the takers"? It is commonly said there are two classes, actual captors and joint or constructive captors. Each of these terms requires some explanation. When a prize is taken at sea, there is usually no doubt as to who is the actual captor, namely, the ship to which the prize strikes its flag. But it is important to observe, that, even so, the phrase actual captors includes others besides those who actually have taken part in the capture. The whole of the ship's crew may not be on board the ship at the time of the capture; or, the prize may have been taken out of sight of the ship, and at a great distance from it, by the ship's tender, or by a boat's crew detached from the ship. But in all these cases, it is the ship, and not a part of the ship, that is held to take the prize. The whole of the ship's crew share. No attempt is made to raise such distinctions as are recognised between ship and ship in cases of joint capture; I mean, distinctions which would disqualify any of the crew, on the ground that they had not been associated in the capture, or had not co-operated, or, in other words, had not contributed to intimidate the enemy or encourage the friend. Yet, looking to principle only, the same distinctions that are taken between ship and ship might be taken between party and party in the ship's crew, nay, even between man and man, and might, with much show of reason, be insisted upon.

It is plain, therefore, that the rule which attributes the capture to the ship rests, not on principle, but on practical convenience. The fact is, that the line must be drawn somewhere; in the distribution of prize it is impossible to make nice distinctions, and there are obvious reasons why no distinctions should be allowed within the limits of a ship's company. The ship itself is a home which includes all the crew, and excludes all others; the crew are an organized body of men, living together in the ship, united in strict discipline under one commander, daily performing regulated and associated duties. If any portion of the crew is detached, they are still under the commander of the ship; they still belong to the

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ship, and in due time will return to the ship. Their detachment, to use Lord Stowell's expression on another occasion, is regarded, not as the severance of a part, but as the stretching out of a limb. To admit distinctions between the members of the same ship's crew in the distribution of prize would greatly increase the difficulty of making out a prize roll; would be invidious, and agreeable neither to the discipline nor welfare of the service.

Naval prize. Joint captors.

The term "joint captors" denotes those who, not being themselves "actual captors," have nevertheless assisted, or are taken to have assisted, the actual captors, by conveying either encouragement to them or intimidation to their enemy. The presumption of the law is always in favour of actual captors as against those who claim to be joint captors. Under certain circumstances, claims of joint capture are admitted, but the Prize Court has again and again declared its resolution not to extend the operation of that doctrine. (1) Actual capture may therefore be taken to be the rule which will always be enforced in the adjudication of naval prize, except in cases in which the application of constructive capture is well recognised and established.

These cases are twofold, association and co-operation, both resting on the same principle, encouragement to the friend, intimidation to the enemy. Each of these terms is popularly used in different senses, and the two are frequently confounded together. It is necessary, therefore, to fix their respective legal significations. Briefly, then, vessels (or forces) claiming to be joint captors on the ground of association, claim in virtue of some bond of union existing between themselves and the actual captors. Vessels, on the other hand, claiming on the ground of co-operation, claim in virtue of support rendered on the particular occasion to the actual captors. It is thus easy to see how confusion may arise between the two terms; the truth being, that forces which are associated are contemplated beforehand as about to co-operate, and that forces which co-operate frequently appear to act as if they had been associated. Moreover, the two grounds of claim to joint capture often co-exist. Forces are first associated, and then actively co-operate.

(1) *Le Niemen*, 1 Dods. 16; *Buenos Ayres*, 1 Dods. 33; *John*, 1 Dods. 363; *Arthur*, 1 Dods, 423; *Dordrecht*, 2 C. Rob. 71; *Odin*, 4 C. Rob. 325.

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Having thus stated the general distinction between the two terms, I proceed to consider each separately, with a view to ascertain what sort of union constitutes association, and then, what sort of services constitutes co-operation.

Naval prize Association.

If vessels have been associated together, a capture made by one enures to the benefit of all; and it is not necessary that the capture or chase should have been made in the sight of the others, or that the others should be co-operating beyond this, that each at the time of the capture should be discharging the part assigned to it of the service for which all are associated. "Whether," says Lord Stowell, "that part is important or not, is not so material, the part is performed, and that is all that was expected;" (1) and again, "by the very fact of their association, there exists that which is of the very essence of the claim, encouragement to the friend, and intimidation to the enemy." (2) Such association is recognised in the case of vessels associated by superior authority for the purpose of cruising together (3), or for the purpose of maintaining a blockade (4); and in the case of vessels temporarily associated under the orders of the senior of their respective commanding officers for the purpose of chasing and capturing one or more prizes. (5)

In all these cases it will be observed that the joint captor was at the time united with the actual captor under the immediate command of the same naval officer. In fact, such union, and such union alone, constitutes the bond of association recognised by the law as a title to joint sharing. Community of enterprise does not constitute association. This is conclusively shewn by the case of the *Arthur*. (6) That was a claim on behalf of her Majesty's ship *Paz* (under Lieutenant Pring) to be considered a joint captor with her Majesty's ship *Blazer*, of a prize captured for breach of the blockade of the river Eems. Both vessels had received orders from Lord G. Stuart, the commander-in-chief of the station; the *Blazer* in July, the *Paz* in December, of the year 1809. The orders to the commander of the *Blazer* were not produced, but it was assumed that they were the same as those given later to the

(1) *Dordrecht*, 2 C. Rob. 65.
(2) *L'Etoile*, 2 Dods. 110.
(3) *Forsigheid*, 3 C. Rob. 317.
(4) *La Henriette*, 2 Dods. 98; *Guillaume Tell*, Edwards, 6; *Forsigheid*, Edwards, 126.
(5) *Empress*, 1 Dod. 368. Same case cited in *Rattlesnake*, 2 Dod. 36.
(6) 1 Dodson, 423.

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commander of the *Paz*, which were to "maintain the blockade of the Eems, and to protect the trade to and from Heligoland." The *Blazer* captured the vessel. The claim of the *Paz* to share in the prize was argued upon two grounds, first, upon that of being engaged in a common enterprise, the blockade of the river Eems; and, secondly, upon that of having been in sight at the time of the capture. The argument is thus stated in the Report:

> The two vessels were employed as associates in the same service under the orders of the same commanding officer: for though the order given by Lord G. Stuart does not in terms direct the *Paz* to associate itself with the *Blazer*, yet in substance it does, for it directs that ship to take a part in the same service in which the other was already engaged. To constitute an association between two ships, nothing more is necessary than that they should act together for the same purpose, under the orders of the same superior authority, and such was the case in the present instance. The capture also appears to have grown out of the common purpose for which they were associated.

These arguments, however, were not accepted by Lord Stowell, whose judgment I must set out at some length, because though the case was peculiar, the judgment throws much light upon the general law of the subject. After stating that the Order in Council imposing the blockade of the river Eems had been issued in the way of retaliation for the measures which had been previously adopted by the French government against the commerce of the country, and that the blockade imposed by it was applicable to a very great extent of coast, and was never intended to be maintained according to the usual and regular mode of enforcing blockades, by stationing a number of ships and forming as it were an arch of circumvallation round the mouth of the prohibited port, his lordship proceeded to observe as follows:

> Though the principle of association had not been of late favoured either here or in the Court of Appeal, the Court certainly held that where ships are acting together in the maintenance of the same blockade, there is in the nature of such an association an identity of service that forms a just foundation for joint interest in prizes taken for the violation of the blockade, because it could not be supported without unity of operation. The connection between ships so employed is of so intimate a nature that they may be considered as forming links of the same chain. But the same consideration is not applicable to this species of blockade, which was sometimes maintained by a single ship. There no such circumvallation is necessary; and although a number of different ships may be engaged in maintaining the blockade, yet they are not so connected and continued as to form one mass of obstruction to the communication which may be attempted to be carried on with the prohibited port.

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He then commented upon the fact that in the instructions to the commander of the *Paz* not a word was said of any other vessel employed upon the same service; that no mention was made of any connection with the *Blazer*, the actual captor; that nothing in the nature of an associated service was adverted to, the effect being that Lieutenant Pring was to maintain the blockade according to his own discretion, and without reference to the directions of any senior officer; and on these grounds Lord Stowell held that the order issued by Lord George Stuart did not constitute a privity of service.

The same doctrine is laid down in the case of *Le Niemen* (1), which in the marginal note is thus stated: "Claims of joint capture on the part of the *Emerald*. *Amethyst* and *Emerald* joint chasers; they separate. *Emerald* loses sight of the prize, but continues to cruise in search. *Amethyst* engages. *Arethusa* comes up and makes the actual capture. Claim of the *Emerald* rejected." In reference to that part of the allegation which stated that "on the 5th day of April the *Amethyst* and *Emerald* cruised in company in the bay to the westward of the coast of France," Lord Stowell remarked:

> This can be considered little more than an accidental junction, no particular bond of association being imposed upon them by public authority.

And again, later:

> It does not appear that there was any particular concert between these two vessels or any authority directing a co-operation between them. The signals that were made did not convey any instructions as to the courses proper to be pursued, there was no common co-operation, except such as the discretion of two parties acting separately with a common object in view might produce.

Community of enterprise is equally insufficient as a ground for joint sharing, if the bond of union, though originally well constituted, has ceased to be in force at the time of the capture. Thus if a number of vessels have been associated under one commander and afterwards some are detached, the association becomes dissolved and between those detached and the others there is no joint sharing: *Vryheid* (2); *Island of Trinidad* (3); *Stella del Norte.* (4)

In all these cases the argument of common enterprise was set

(1) 1 Dodson 9. (2) 2 C. Rob. 22. (3) 5 C. Rob. 92. (4) 5 C. Rob. 349.

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up, and in all rejected, Lord Stowell observing in the *Vryheid* that "in a more enlarged sense the whole navy of England might be said to be contributing in the joint enterprise of annoying the enemy."

The real question which in all these cases the Court had to decide, was, whether the vessels had been effectually detached. (1) If so, it could make no difference that the purpose of this detachment might possibly be connected with the main service, if it carried the vessels out of the scene of the common operations for the time. Even vessels which in being detached to cruise between certain points received orders "to join the fleet occasionally for communication" would, in Lord Stowell's opinion, be deemed temporarily dissevered from the fleet, so that no joint sharing would exist between them. This doctrine was carried a great way in the *Le Bon Aventure*. (2) In that case a vessel came in sight of a fleet on a cruise: by signal the *Albion* was detached from the fleet to give chase; she did so and captured her in sight of the fleet; she then seeing another vessel went in chase without receiving any further signal, and captured her many miles from the fleet, which at the time was going almost in an opposite direction. The fleet claimed to share in the second prize as well as the first upon the ground of association throughout the whole transaction comprising both chases, but the claim was rejected. Sir William Grant, in delivering the judgment of the Court of Appeal affirming the decree of the Court below, declared that no "such principle as that advanced had ever been recognised, nor did the cases cited support any such construction of the term association." In the peculiar case of the *Nord Stern* (3), vessels, though associated under the same commander in the maintenance of a blockade, were not allowed to share in a prize made by one of them, because the fleet were associated solely for the purpose of a *military* blockade, whilst the vessel captured (the cargo of which was condemned) was a *merchantman*.

Naval prize. Co-operation.

I now leave the question of association, and pass to the consideration of what, in default of association, constitutes such co-operation as will confer a title to a joint share of prize. The application

(1) *Forsigheid*, 3 C. Rob. 315. (2) 1 Acton, 238.
(3) 1 Acton, 128.

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of this doctrine, also, is strictly limited. The limits are those within which encouragement to the friend and intimidation to the enemy as a matter of fact operate. A vessel out of sight of the captor cannot give encouragement to the captor, and, out of sight of the prize, cannot cause intimidation to the prize. Hence what is called the rule of sight. A vessel, being unassociated with the actual captor, must, in order to substantiate a claim as joint captor, prove that in course of the chase she was in sight of both the prize and the captor. More than this, she must have been in sight under circumstances to cause intimidation to the prize and encouragement to the captor. It is true that in the case of the vessel in sight being one of her Majesty's vessels a presumption is raised in her favour that she is there under circumstances to cause such intimidation and encouragement, but this presumption may be rebutted by shewing (1) that she had no animus capiendi, as would be the case if she were steering in another direction, or lying disabled in port, or fixed by her duty to a blockading station. These limits upon the doctrine of co-operation are rigidly enforced. Indirect or remote co-operation is not recognised. Diversion of the prize is not co-operation. Thus in a case (2) where three ships of the royal navy, but not in company, had taken their station at three different outlets from Port-au-Prince to intercept a French vessel which was known to be designing her escape, and which must necessarily pass through one of the three outlets, the ship which took the prize was held to be entitled to it, to the exclusion of the other two, who claimed as joint captors. And in his judgment in the case already adverted to of *Le Niemen* (3) Lord Stowell says:

> With respect to the other ground on which the claim is attempted to be established, that the *Emerald* diverted the course of the enemy and threw her into the hands of the *Amethyst*, I am not aware of any such principle. It appears to me to be perfectly novel. That it is capable of being abused to a very considerable extent the cases which have been mentioned I think clearly prove. Among the instances enumerated by the counsel, is that of the chase of the French fleet by Lord Nelson, when he pursued it to the West Indies and back, and drove it into the lap of Admiral Calder. Another case pointed out is that of the four French ships flying from Trafalgar, and afterwards captured by Sir Richard Strachan. A

(1) *Galen*, 2 Dod. 24. (2) *Mars*, cited in *Vryheid*, 2 C. Rob. 22.
(3) *Le Niemen*, 1 Dods. 17.

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third instance was that of an enemy's ship crippled and left by a British frigate with which she had an action in a disabled state, and afterwards taken possession of by a ship accidentally arriving on the spot. In none of these cases was it ever pretended that any but the actual captors were entitled to share. It would indeed be a monstrous position that every fleet or ship which, either by accident or design, diverts the course of an enemy, and by so doing occasions her capture by a totally distinct force, should be considered a joint captor.

General result of prize decisions.

The result of these prize decisions, so far as it is available for present purposes, seems to me to be as follows: They declare actual capture to be the rule, joint capture the exception, admissible only in certain cases. They lay down the principle which underlies all cases of joint capture, viz. encouragement to the friend, intimidation to the foe. They exhibit the two modes in which this principle operates, association and co-operation. Lastly, they enforce the necessity, for the sake of the principle itself, of assigning some limits to what shall constitute co-operation. But what shall be the limits in the case of booty captured on land, this they do not decide. The limits must be very different from those recognised in prize cases, just because warfare on land is so different from warfare at sea.

Speaking generally, the surface of the sea is even and navigable, whilst the land has its mountains, valleys, rivers, bridges, forts, and towns, each of which has to be considered beforehand in the planning of the campaign. At sea communication is not possible except by boats, and between vessels out of sight of one another is most precarious; on land communication is usually practicable. Ships move swiftly, carry their own supplies, and are independent of one another; but an army advances comparatively slowly, and then not with safety, unless its flanks and rear have been to some extent secured. The destruction of the enemy's mercantile marine is frequently the sole object of naval warfare; a campaign, on the contrary, is always systematic, is never carried on for the sake of booty. Prize consists of vessels afloat and the cargoes they carry, is essentially moveable therefore, and cruisers have to scour the sea in search of it; on the other hand, booty is for the most part stored up in towns and at other fixed points of military operations. The captor of a vessel has that for his prize and no other; but the defeat of a hostile army may place at the mercy of the conqueror a town 100 miles off containing abundance of booty.

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These distinctions, and many others might be added, between captures on land and captures at sea, all lead to one result. They all tend to shew that, in considering the basis of joint capture of booty, a wider application than that recognised in prize cases must be allowed to the term co-operation; because concerted action on a vaster scale than ever is feasible at sea is indispensable to a campaign, and because military operations, as compared with nautical, exercise an effectual influence over a far wider range both of space and time. Thus, the rule of sight which prevails at sea is altogether inapplicable on land.

Nor must I overlook the peculiarities of the particular war in which this booty was captured. It was no ordinary war; its object was to suppress a mutiny, and a rebellion into which that mutiny had developed; a whole country had to be pacified. This called for military operations ramifying in different directions, yet brought to bear on a common end. Then the theatre of the war was British territory, or under the surveillance of British authorities, who in consequence were familiar with its topography, and possessed manifold means of communication. Thus, the sphere of co-operation would necessarily be enlarged. Moreover, amongst an enemy consisting not only of sepoy mutineers, but of insurgents not regularly trained to bear arms, and of a disaffected people, rumours of British successes would be swift to circulate, and sure to spread effectual intimidation far and wide.

Booty cases

I now proceed to consider the principal instances of booty taken on land, my object being to discover what, if any, has been the accustomed mode of its appropriation by the authority of the Crown. There is, however, one difficulty which attaches to each of such cases, namely, that of ascertaining with sufficient accuracy all the circumstances. There is in this respect an essential difference between naval and land capture. The circumstances connected with the acquisition of booty, unlike those of naval captures, are frequently numerous, complex, and extending over a long space of time. In order to ensure accuracy, I have, wherever practicable, availed myself of the original documents furnished to the Court by the Treasury and other public offices.

Egypt, 1801.

Egypt, 1801. In this case the original documents, at least the most important ones, are not now forthcoming, but I believe the

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facts to be as follows: A scheme on a vast scale was projected to assist the Ottoman government to expel the French from Egypt. One force, under Sir Ralph Abercromby, was to be conveyed by the Mediterranean fleet to the north coast of Egypt, and there to effect a landing. Another force, under Sir David Baird, was to be despatched from Bombay, to be landed at Suez, and thence march across to join Sir R. Abercromby, who was military commander-in-chief of the expedition. The Ottoman naval and military force were also to co-operate. On the 1st March, 1801, Sir R. Abercromby landed in Aboukir Bay; on the 21st he fought the battle of Alexandria, and lost his life. General Hutchinson thereupon succeeded to the post of commander-in-chief; on the 19th April he compelled Rosetta to surrender; on the 10th May he took Rhamanich; then, marching south on Cairo, he invested it on the 20th May, and two days afterwards it capitulated.

At this time Sir D. Baird and his force were still on the sea, detained by contrary winds. It was not till six weeks afterwards, namely, in the beginning of July, that they landed in Egypt, at a place called Kosseir, on the western coast of the Red Sea. Thence they marched across the Desert, due westward to the banks of the Nile; there embarked, and joined the forces at Cairo under General Hutchinson on the 10th August. The entire army then descended the Nile to attack Alexandria. Sir D. Baird in the first instance was ordered to Rosetta, but rejoined General Hutchinson under the walls of Alexandria just before it capitulated, at the end of August or beginning of September.

At the close of the campaign, a memorial was presented by Lord Keith (admiral and commander-in chief on the Mediterranean station) and General Hutchinson, stating that booty had been captured at Rosetta, Rhamanich, Cairo, Alexandria, and other posts, and praying for a grant of the booty; and in accordance with the prayer of this memorial, the whole of the booty was ultimately granted to those two officers as trustees to distribute it amongst such persons employed in the army and navy in the capture as might be entitled thereto according to the usual plan of distribution. Under this grant it appears that Sir D. Baird's force were allowed to share in common with the Mediterranean force.

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Counsel for the defendants relied on this case as an instance of constructive capture, inasmuch as Sir D. Baird was admitted to share in the Cairo booty, although he was on the sea when Cairo was captured. This argument would be of greater weight, if the booty distributed had consisted exclusively of booty captured at Cairo, instead of being, as it was, the booty captured at all the places taken in the course of the expedition, including Alexandria, at the fall of which Sir D. Baird was undoubtedly present. Where several successive captures have been made, it is not an unusual course to throw the produce of all into one common fund, to be distributed by a single process amongst all who have been present at any one of the captures; at least it is not unusual in cases where multiplicity of distributions might lead to a result not substantially different. I think it right to make this observation; but, with regard to this Egyptian expedition, I am not aware of the respective values of the different captures which were accomplished.

Mahratta war. 1803.

The Mahratta war of 1803 was directed against the two great Mahratta chiefs, Scindiah and the Rajah of Berar. Scindiah's dominions, it should be stated, then extended from the frontiers of the Nizam's territory, far away north up to Agra and Delhi. The plan of the British government was that the territories of Scindiah and the Rajah of Berar should be invaded at the same time by two armies, one from the north, under General Lake, the commander-in-chief of India, and the other from the south, which may be designated the Deccan army, under Major-General Wellesley. The Deccan army was furnished principally from the Madras presidency; Lieut.-General Stuart was commander-in-chief of the Madras army, but he was not commander-in-chief of the Deccan army; Major-General Wellesley, besides being invested with full political power, was nominated commander-in-chief of the Deccan army, subject eventually to the orders of General Lake or Lieut.-General Stuart; that is, subject to General Lake, if the Deccan army and Lord Lake's army met in the field, or to Lieut.-General Stuart, if Lieut.-General Stuart should think fit to take the field at the head of the Deccan army. As it turned out, Lieut.-General Stuart remained in Madras, and no junction took place between General Lake and General Wellesley; their move-

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ments were separated by an interval of hundreds of miles, General Lake operating in the Doab, General Wellesley in the Deccan. Booty was taken by each army, but of very unequal value. The distribution was carried out as follows. In the first place, as between the two armies, the principle of actual capture was strictly applied. Neither shared, or even claimed to share, in the captures made by the other.

Secondly, as between the different component parts of the Deccan army, and as between it and certain other forces. The army of the Deccan proper consisted of two divisions, one under General Wellesley's personal command, the other under that of Colonel Stevenson; the operations of these two divisions were sometimes separate, sometimes combined, but all of them were to the north-east of Poonah, the nearest capture being at about eighty miles from that place. Besides the Deccan army, properly so called, there were:

1. Madras forces stationed at Poonah;
2. A force at Hyderabad (the capital of the Nizam, above 300 miles south-east of Poonah), under the command of Major-General Irton, for the purpose of securing tranquillity there;
3. A force at Moodghul, fourteen marches south-west of Hyderabad, called the corps of reserve, under Major-General Campbell, who was senior to General Wellesley, and who had directions to send detachments forward to General Wellesley on receiving any requisition to that effect; and it appears that on two occasions such detachments were actually sent.

When the booty taken by the Deccan army came to be distributed, claims were put in both by Major-General Irton and by Major-General Campbell, but both were rejected. The principle of actual capture was enforced. The whole of the booty was assigned to the army of the Deccan proper, to the exclusion of the forces at Poonah, Hyderabad, and Moodghul, except such part of those forces as had been detached to serve with the army in the field, and had actually joined. On the other hand, no attempt seems to have been made to distinguish between the captures made by General Wellesley's division and those made by Colonel

Stevenson's; the produce of both went to form one common fund. No doubt this was in consequence of the two divisions having been in many of their operations combined. It is thus apparent that the distribution of the Mahratta booty was made in accordance with the rule of actual capture. 1866 BANDA AND KIRWEE BOOTY.

The warrant, dated March 30, 1817, recites that it had been agreed by the allies engaged in the campaign against France, that the sum of 25 millions of livres should be retained for the service of Great Britain out of the 700 millions to be paid by France to the allied powers: That great quantities of ordnance, arms, stores, magazines, and other booty had been captured by the army under the command of Field Marshal the Duke of Wellington in the brilliant and decisive campaign which terminated in the capture of the city of Paris, some of which had been brought to this kingdom as trophies, and the remainder left for the use of the King of France: That it was just and necessary that the distinguished services of the said army should be acknowledged by some reward, and that application had been made to the Crown by the Duke of Wellington to grant the said sum of 25 millions of livres to the army under his command engaged in the battles of the 15th, 16th, 17th, and 18th days of June, 1815, or in the capture of Paris, as a reward to the said army as booty and prize, in lieu of the said ordnance, arms, stores, and booty captured and delivered up by the said army. The warrant then proceeded to grant to the Duke of Wellington the said sum of 25 millions of livres in trust for the benefit of himself and the officers, non-commissioned officers, and privates of the British and allied troops serving under his command and engaged in the battles of the 15th, 16th, 17th, and 18th days of June, 1815, or employed in blockades or sieges in France, or which had joined the said army in France before the 7th day of July, 1815, as booty or prize to be distributed, as to such proportion thereof as should come to the British troops, under the provisions of the Army Prize Money Act (54 Geo. 3, c. 86). Waterloo, 1815.

The grant, beyond that it is a grant, not of booty, but of money in lieu of booty, and to be distributed as booty, scarcely calls for observation. The money was not apportioned to each capture; but for the purposes of distribution, the successive captures were treated as one. On this point, the remarks which I have already made in

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the case of the Egyptian expedition are applicable, and need not be repeated here.

I now enter upon the *Deccan* case, which may be called the leading case on the subject of military booty, not only on account of the magnitude of the sum at stake, but because the decision, though not that of a strictly legal tribunal, was made after great consideration. The litigation was long and strenuous; on two occasions there was an argument by counsel, in the course of which both the principles and practice relative to booty were fully reviewed.

In the year 1817 the Indian government had occasion to punish the predatory hordes of the Pindarries. At that time the Marquis of Hastings was governor-general and commander-in-chief of India; and Sir Thomas Hislop was commander-in-chief of the Madras army. The plan was to invade the territory of the Pindarries by two armies at once, one from the north and the other from the south. Lord Hastings himself, as commander-in-chief of India, took the field at the head of the northern army, called the grand army; the southern or Deccan army was placed under Sir Thomas Hislop, not, however, in his capacity as commander-in-chief of the Madras army: he was specially appointed commander-in-chief of the Deccan army, subject only (in the event of a junction in the field) to Lord Hastings; and besides he was invested with the fullest political power. The grand army consisted of three divisions, and a reserve, and there was also a corps of observation under Brigadier-General Hardyman. The Deccan army consisted of five divisions, and a reserve division, and in addition there were some Bombay troops in Guzerat under Sir W. Grant Keir, of which Sir Thomas Hislop was to have the disposal, contingently upon his operating beyond the Nerbudda.

In the first instance, war was contemplated only against the Pindarries, and Lord Hastings as governor-general issued a general order, that in consequence of the peculiar and desultory nature of the warfare, in which so many separate divisions and detachments were engaged against the Pindarries, all prize captured from the enemy should be considered as the prize of that division by which, or by detachments from which, it should have been seized. Shortly, however, after the beginning of the war, a more formidable enemy than the Pindarries appeared in the powerful Mahratta chiefs,

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namely, the Peishwa, the Rajah of Berar, and Holkar, who almost simultaneously rose against the British power, each assailing the British troops in his own territory or neighbourhood. But before the end of the year 1817, the respective capitals of these chiefs—Poonah, Nagpore, and Mahidpore—had all fallen into the hands of the army of the Deccan, Poonah having been captured by the 4th division, Mahidpore by the 1st and 3rd divisions, and Nagpore by the 2nd and part of the 5th division. These capitals are situated hundreds of miles from each other; and on each occasion the other divisions of the army of the Deccan were not within 200 miles of the captured town; and all the divisions of the grand army were still further off. The Mahratta chiefs were thus soon subdued. Peace was concluded with Holkar early in January, and the Rajah of Berar was deposed in February. On the 31st of March the Deccan army was broken up; the war with the Peishwa was continued until June. Much booty was taken from the Mahrattas, and there was some sort of an agreement between the different divisions of the Deccan army that all the divisions should equally share in the booty taken by each. Questions then arose as to whether the general orders which had been issued by the governor-general respecting the booty captured from the Pindarries would apply equally to booty captured from the Mahrattas. Claims to share as joint captors in this latter booty were put in on behalf of Lord Hastings and the grand army; also on behalf of Brigadier-General Hardyman and Sir W. Grant Keir. The claims of these two last-mentioned officers require to be specially stated.

General Hardyman's claim.

General Hardyman's claim was for a share in the booty taken at Nagpore. It would appear that on November 26, the rajah attacked the British residency in Nagpore; November 29, reinforcements came up of the 2nd and 5th divisions of the Deccan army; December 16, the rajah's field army was destroyed, and the city besieged; December 24, the city was unsuccessfully assaulted; December 30, the city capitulated. General Hardyman's forces were not part of the Deccan army, nor yet strictly speaking, as it would appear, of the grand army. He was, however, under Lord Hastings' command, and by him placed at the head of a small corps of observation, and stationed at Rewah, for the purpose of cutting off the retreat of the Pindarries in that direction. On

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December 3rd, Lord Hastings sent orders to him at once to advance with the whole of his force to Telwara Ghaut, on the Nerbudda, there to open communications with Lieut.-Colonel MacMorine (the commander of a portion of the 5th or Nagpore division of the Deccan army), and also with the resident at Nagpore; to advance to Nagpore, if he received a requisition to that effect from the resident; but in the event of his receiving intelligence of any acts of hostility against the British at Nagpore, at once to push on to that city. In obedience to those orders, General Hardyman at once set out; on December 19, on his way to the Nerbudda, he defeated at Jubbulpore a large body of the Nagpore rajah's troops, and about the 26th, he was thirty miles south of the Telwara Ghaut. This was the nearest point to Nagpore which he reached, being nearly 200 miles distant. At the Ghaut he received from the resident at Nagpore, a letter dated December 20th, informing him that there was complete security at Nagpore, and that his services would be of greater use near the Nerbudda, to prevent the rajah's troops crossing the river, and to keep open the communication between Nagpore and Jubbulpore. In consequence he fell back upon Jubbulpore; subsequently he received a second letter from the resident at Nagpore, dated December 23rd, urging him to resume his march on Nagpore, and he was preparing to do so, when he was again countermanded. His services were thus described at the time by Lord Hastings in a dispatch to the secret committee, written on the 29th December, 1817:

> An attack still more base, because more insidiously prepared, has since been similarly baffled at Nagpore, by equal intrepidity on the part of Mr. Jenkins and his gallant supporters. The discomfiture of the immense force by which they were assailed is an achievement of the highest splendour; subsequently, an advantage on a limited scale, but not of trivial consequence, was secured by Brigadier-General Hardyman's routing the force which the Rajah of Nagpore had raised west of the Nerbudda. Material resources were thereby cut off from the rajah, while a most valuable line of communication was retrieved for ourselves, and the action itself was marked with meritorious decision, as well as by soldier-like arrangement.

Sir W. Grant Keir's claim.

The claim of Sir W. Grant Keir was to a share in the booty taken at Mahidpore. He was, as I have stated, the commander of a small body of Bombay troops stationed in Guzerat; Guzerat is what was then the extreme west frontier of British India, and was intermediate

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between the grand army and the army of the Deccan. Sir W. Grant Keir's forces did not constitute part of the army of the Deccan, but their services were placed at the disposal of Sir Thomas Hislop contingently on the event of his operations being carried on north of the Nerbudda. On December 4th, when Sir Thomas Hislop was advancing rapidly to the north against Holkar, Sir W. Grant Keir received orders, apparently at the instance of Sir Thomas Hislop, to leave Guzerat, and enter Holkar's territories. This he accordingly did, and on the 13th reached Dawad; there he was met by orders from the Bombay government to countermarch two marches to Juree. At Juree, on the 17th December, he received further orders giving him discretionary authority to continue his advance, and thereupon he immediately marched to join Sir Thomas Hislop. On the 19th he again reached Dawad; there found orders from Sir Thomas Hislop to go to Rutlam; reached Rutlam on the 24th, and on the 30th joined Sir Thomas Hislop at Sepree, and from that day the Guzerat division was reckoned as forming part of the Deccan army. Meanwhile on December 21st, Sir Thomas Hislop, with the 1st and 3rd divisions of the Deccan army, had captured Mahidpore, the Guzerat forces being at that time about 100 miles distant.

The whole case was argued by counsel before Lord Liverpool and the other Lords of the Treasury, and they, on the 5th February, 1823, agreed to a minute, of which the material part is contained in the following extract:

My lords having heard counsel in support of the claims of the Marquis of Hastings and the grand army, and of those of Sir Thomas Hislop and the army of the Deccan, and having maturely and deliberately weighed and considered all the documentary evidence laid before them in behalf of the several parties, and the arguments of the counsel, are of opinion that the most just and equitable principle of distribution will be to adhere, as nearly as the circumstances of the case may admit, to that of actual capture, and that although they are aware that the principle of constructive capture must, under certain circumstances, in a degree be admitted, the disposition should be to limit rather than to extend that principle.

They are therefore of opinion that the mode of distribution originally intended by the Marquis of Hastings, would be most equitable and just with respect to the booty taken at Poonah, Mahidpoor, and Nagpore, and that the booty taken on each of those occasions respectively should belong to the divisions of the Deccan army engaged in the respective operations in which the same was captured. But that, as the division of the Bengal army under Brigadier-General Hardyman appears to have been put in motion for the purpose of co-operating directly in the reduc-

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tion of Nagpore, and to have been actually engaged with a corps of the enemy antecedent to the surrender of that place, this division appears to my lords to be justly entitled to share in the booty captured at Nagpore. And that such other booty, arising from the operations against the Mahrattas in the years 1817 and 1818, as may now be subject to his Majesty's royal disposition, should be granted to such divisions of the grand army under the command of the Marquis of Hastings, and of the Deccan army under the command of Sir Thomas Hislop, as may respectively have captured the same.

My lords are also of opinion that, conformably to the letter of the Marquis of Hastings to Sir Thomas Hislop of the 12th of January, 1818, Sir Thomas Hislop, as commander-in-chief of the Deccan army, and all the officers of the general staff of that army, are entitled to participate in the booty which may arise from any capture by any divisions of the army of the Deccan, until the said army of the Deccan was broken up on the 31st March, 1818.

My lords have felt it to be inconsistent with their duty to recommend to his Majesty to give his sanction to any agreement for the common division of booty into which the several divisions of either army may have entered, as it is their decided opinion that if the principle of actual capture be not adopted in this case as the rule of distribution, no other correct or equitable rule could have been adopted than that of a general distribution amongst all the forces of the Presidencies engaged in the combined operations of the campaign.

The above is the only decision in the *Deccan* case which really affects the present question. It is a distinct assertion of the doctrine of actual capture. Not only was the grand army excluded from the booty taken by the Deccan army, but within the Deccan army each division had the exclusive enjoyment of the booty taken by itself. In other words, the principle of actual capture was enforced as between army and army, and between division and division. It was not, however, pushed further as between detachment and detachment of the same division.

It was contended by some of the counsel in the present case that this assertion of the doctrine of actual capture was neutralized by the awarding of a share to General Hardyman, as joint captor, of the booty taken at Nagpore, inasmuch as at the time he was nearly 200 miles off. Upon this point it may be sufficient to say that their lordships seem to have been of opinion, whether rightly or wrongly, that General Hardyman's services had been contributory to the actual capture of Nagpore, and as such justified his claim to be considered a joint captor. It is to be observed that, at the same time that they allowed this claim of General Hardyman, they silently passed over the claim, in other respects stronger, of Sir W. Grant Keir to share in the Mahidpore booty, no doubt

because that officer, in their opinion, had not contributed to its capture. In any view of the matter the minute of the 5th of February, 1823, remains as an enunciation of actual capture as the general rule to be applied in all cases, except where circumstances render it inadmissible.

To this decision of the 5th of February, 1823, there was a sequel which, in my opinion, has no bearing upon the present case; it must be mentioned, however, because it has been made the subject of much argument and of some confusion. After the decision it turned out that the actual circumstances of the case were very different from those which had been assumed at the hearing. In point of fact the Deccan army had taken no booty at Poonah, Nagpore, or Mahidpore, and none elsewhere, except a sum of about 150,000*l.*, the produce of sales in camp and elsewhere of captures made in the daily operations of the different divisions; on the other hand, *after* the Deccan army had broken up (March 31, 1818), very large property, amounting to several hundreds of thousands of pounds, belonging to the Peishwa, had fallen into the hands of the East India Company, and upon the claim of the Crown had been delivered up as booty. This after-acquired property consisted of—1, arrears of tribute as due to the Peishwa; 2, jewels, &c., left at Nassuck by the Peishwa in his flight; 3, deposits of the Peishwa, which had been made partly with persons at Poonah, partly with the killedar of a fort near Poonah, called Ryeghur, but all of which were ultimately recovered at Poonah. These new facts having been laid before the Lords of the Treasury by the trustees for the distribution of the booty, their lordships determined to re-consider their decision, so far only as it might be taken to affect the booty obtained subsequent to the dissolution of the Deccan army, and after a further argument from counsel directed to this point, they adopted conclusions to the following effect: With regard to all booty taken in the daily operations of the troops, they re-affirmed the doctrine of actual capture as enunciated in their former minute. With regard to the property that fell into the hands of the East India Company after the close of the war, the doctrine of actual capture was plainly inapplicable, there being no actual captors; and, under the circumstances, their lordships held this property to have been acquired

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by the general result of the war, and as such to be divisible amongst the forces of all the presidencies engaged in the combined operations of the campaign, that is, amongst both armies, the grand army and the Deccan army, the commander-in-chief's share being assigned to the Marquis of Hastings. But even so, they made a special reservation in favour of actual captors, in case any such might appear, by providing that in the event of its being proved that any part of such property, though not recovered till the end of the war, had been within a fort or city at the time of the capture of such fort or city, that part was to be awarded to the actual captors of the place. These conclusions were embodied in a minute, dated 16th January, 1826, which was in the following terms:

PRESENT:

The Earl of Liverpool.	Lord Lowther.
The Chancellor of the Exchequer.	Lord Granville Somerset.
Mr. Berkeley Paget.	

My lords, assisted by the trustees of the Deccan booty, Lord Bexley, and the law officers of the Crown, having heard counsel on behalf of the Marquis of Hastings and the grand army, and also on behalf of Sir Thomas Hislop and the army of the Deccan, upon the subjects of the discussion relating to the distribution of the Deccan booty, which have arisen out of the difference between the actual circumstances attending the capture of a large proportion of that booty, as stated by the trustees, and those which were assumed at the hearing before their lordships in January, 1823, and having maturely considered the arguments severally stated by the counsel, and also the whole documents upon the subject of this booty, now before the board, are of opinion:

1st. That with respect to all that portion of the booty now at the disposal of the Crown, which is described as having been taken in the daily operations of the troops, the distribution thereof should be made to the actual captors, according to the terms and conditions of the minute of this board of the 5th of February, 1823, and of the warrant of his Majesty of the 22nd of March following.

2nd. That with respect to that part of the booty which consists of the produce of arrears of tribute, rent, or money due to the Peishwa, it appears to my lords to have been acquired by the general result of the war, and not by the operations of any particular army or division; and they are of opinion that it ought therefore to be distributed in conformity with the alternative stated in their minute of the 5th of February, 1823, as being the only correct or equitable rule, if the principle of actual capture cannot be adopted, viz. amongst the forces of all the presidencies engaged in the combined operations of the campaign.

3rd. With respect to the property captured at Nassuck, my lords are of opinion that the booty recovered at that place cannot be distributed upon the principle of actual capture, and ought therefore to be divided amongst the forces of all the presidencies engaged in the combined operations of the campaign.

4th. With respect to the booty recovered at Poonah, alleged to have been

removed thither from Ryeghur, my lords are of opinion that the booty cannot be distributed upon the principle of actual capture, to the force by which Ryeghur was taken under the orders of the government of Bombay, unless it can be proved by the captors of Ryeghur that the property in question was actually in that fort at the time when it was taken; in default of which proof, my lords are of opinion that this booty also ought to be distributed among the forces of all the presidencies engaged in the combined operations of the campaign.

5th. With respect to that portion of the booty which is stated to consist of money recovered on account of deposits made by the Peishwa, my lords are of opinion that any part of this property which can be proved to have been in Poonah at the time when that place was captured, viz. on the 17th of November, 1817, ought to be distributed to the captors of Poonah, according to the terms of the minute of the 5th of February, 1823, upon the principle of actual capture; but that with respect to those parts of the above property as to which such proof cannot be established, such moneys or effects must be considered as having been acquired by the general result of the war, and, as such, ought to be distributed amongst the forces of all the presidencies engaged in the combined operations of the campaign.

6th. With respect to the share of the commander-in-chief in the distribution under the several heads above enumerated, my lords are of opinion that the Marquis of Hastings ought to share as commander-in-chief in all those cases in which Sir Thomas Hislop is not entitled to share as such under the terms of the minute of the 5th of February, 1823, wherein it is declared that Sir Thomas Hislop, as commander-in-chief of the Deccan army, and all the officers of the general staff of that army, are entitled to participate in the booty which may arise from any capture by any of the divisions of the army of the Deccan, until the said army of the Deccan was broken up on the 31st of March, 1818.

My lords are further of opinion that the general rules of division hitherto adopted in distributing booty to the forces in India, among the several classes and ranks of the army, should be adhered to on the present occasion.

Before leaving the *Deccan* case, I should observe that as to the 150,000*l.* (the produce of sales in camp of captures made in the daily operations of the Deccan army) the trustees had found great difficulties in attempting to carry out the mode of distribution directed by the first decision of the Treasury (which awarded to each division the exclusive enjoyment of the booty captured by itself) by reason of the several divisions having at different times consisted of different troops, and of the accounts of the different captures not having been kept distinct. The trustees seem to have represented the state of affairs to the Treasury, nevertheless their lordships in their second decision simply re-enforced the same distribution. What was finally done, whether or not the whole of the 150,000*l.* was distributed amongst all the divisions of the Deccan army without distinction, does not appear. But the

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Burmah, 1824, 1825, 1826.

fact is immaterial—in any event it does not affect the principle of the decision.

The Burmah case is a case of some importance, and the result at which the Treasury ultimately arrived has been the subject of much misconception. The facts were as follow:

In the year 1824, the Indian government organized an expedition against the King of Ava, consisting of military and naval forces combined. The command of the land forces was entrusted to Sir Archibald Campbell. The first object of attack was Rangoon, which is on the Irrawaddy, not far from its mouth; it fell on the 11th of May. For the want of field equipment, Sir Archibald Campbell was unable for the time to advance inland; and, accordingly, placing the main body of his troops under cover at Rangoon, he despatched small expeditions against some of the maritime possessions of the King of Ava in Tenasserim. The forces remaining at Rangoon underwent severe suffering; they were surrounded by a vast hostile army, who, planting in the jungle a circumvallation of stockades, cut off supplies, and harassed both the land and naval force with frequent attacks.

"In this most distressing and apparently hopeless state of affairs, the supreme government, aware of the impression which the withdrawing of the forces from Rangoon would probably make upon the native powers of India, determined to maintain the army in its then existing position. With the view of effectuating this object, great exertions were made to furnish provisions; and, aware of the very unequal force to which the British troops were about to be exposed, the government ordered, as a co-operative measure (to divert a part of the military force of Ava from the Rangoon army) the formation of two other divisions; the one intended to enter the Burmese dominions by Arracan, and the other to threaten Upper Ava by the line of the Munnipoor." (1)

The force which was intended to enter Upper Ava never crossed the Sylhet frontier, and requires no further mention. The operations of the Arracan force I shall presently have to state; for the present I confine myself to the movements of the Ava force, by which term I mean the troops under Sir A. Campbell, and the naval force by which he was accompanied.

(1) Memorial of Sir A. Campbell, March 14, 1831.

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On the 7th December a great victory was obtained at Rangoon over the Burmese army, and shortly afterwards reinforcements arrived, and an advance was commenced up the Irrawaddy in the direction of the capital, about 500 miles off, the vessels in the river co-operating with the troops marching on the banks. On the 1st of April, 1825, Donabew was taken, and on the 25th Proome. The monsoon having commenced, the campaign then closed, and the troops remained at Proome. Whilst there they suffered in the same way as they had done before at Rangoon, the enemy surrounding them with a circumvallation. Early in December the British force beat back the enemy, and recommenced its advance, took Melloon, and still advancing up the river, on the 9th February, 1826, again defeated the enemy at Yebbay, and on the 22nd reached Yandaboo, which is only three marches from the capital, Ava. At Yandaboo they were met by emissaries suing for peace, and the result was a treaty whereby the King of Ava paid to the East India Company a crore of rupees, equivalent to a million sterling, and ceded some valuable provinces, one of which was Arracan. In the course of the war, the Ava force captured considerable booty, and destroyed still more to prevent it falling into the hands of the enemy.

I now turn to the Arracan force; it was assembled at Chittagong at the end of the year 1824. The orders to General Morrison the commander were, that Sir Archibald Campbell should "penetrate into Ava as far as Proome," he should, "as his most important object, accomplish a junction with him (Sir A. Campbell) on the banks of the Irrawaddy; that he should employ all means within his reach to get into communication with him, and regulate his movements in conjunction with his; and General Morrison was informed that for this purpose he would be informed of the movements of the commander-in-chief." In pursuance of these instructions General Morrison, early in January, 1825, at the head of about 11,000 men, marched from Chittagong southwards along the sea-board of Arracan in a parallel line with the Irrawaddy, being at times not further distant from it than 100 miles. A flotilla under Commodore Hayes accompanied the force along the coast. General Morrison captured the fort and town of Arracan in the same month (April, 1825) that Proome was occupied by the

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Ava force. He was opposed by a considerable body of Burmese troops under one of their ablest generals, who afterwards marched across the country and fought against Sir A. Campbell. From Arracan General Morrison sent forward some detachments in an easterly direction inland, in the hopes of discovering a route whereby his force might proceed to the Irrawaddy river, and there join Sir A. Campbell; but the detachments returned with their mission unaccomplished, and General Morrison, with the main body of his force, never got beyond Arracan, where the climate was most destructive. In the winter of 1825—6 the expedition from Arracan was abandoned, and the force was recalled, leaving Ava still unconquered. Throughout the whole period, General Morrison never was within 100 miles of Sir Archibald Campbell, and never was able even to communicate with him. Throughout the time he reported to and received orders from the supreme government. The booty he captured appears to have been very trifling, consisting chiefly of ordnance stores in the Arracan forts which had surrendered.

At the close of the war the East India Company, out of the crore of rupees which they had received from the King of Ava, gave a donation batta to the British forces employed in the war, including not only the Ava land and naval forces, but also the Arracan land and naval forces.

The East India Company presented a memorial to the Treasury for a grant of the booty, described in general terms as the booty taken during the war, to be made to themselves, as to one half for their own proper use, and as to the other half for the use of the army and navy employed in the war. No memorial was presented, on behalf of either General Morrison or Commodore Hayes, in respect of any booty taken either by the Arracan or by the Ava force. But both Sir A. Campbell and Captain Chads presented memorials for a grant of the booty taken by the Ava force; Sir A. Campbell, moreover, praying that, in order to effect a fair distribution, the booty might (as had been the case with the Peninsula booty) be classified according to periods of time. This request was refused by the Treasury as unnecessary, and on the ground that procuring special returns of the time and place of capture of each portion of the booty and of the troops engaged on each particular

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occasion would create delay and expense. Eventually, on the 17th September, 1831, a warrant was issued to the following effect: It recited that at the commencement of the year 1824 numerous unprovoked aggressions committed by the Burmese had induced the supreme government in India to decide upon attacking the Burmese in their own country; that an expedition had been accordingly formed, consisting of troops and ships belonging to his Majesty and the East India Company, under the command of Sir Archibald Campbell and Commodore Grant; that during the hostilities or warfare carried on by the expedition booty had been taken of the value of 5,17,683 rupees, exclusive of boats and other property destroyed in order to prevent their falling into the enemy's hands, of which no authentic account had yet been furnished; and that memorials had been presented by the company and by Sir A. Campbell. Then it granted the said captured booty to the company, upon trust to retain one half to the proper use of the company, and to distribute the other half amongst the land and naval forces employed in the said expedition, according to a scheme therein set forth. The warrant closed with a provision for the settlement by the company of all doubtful claims that might be advanced under the warrant, subject to any order the Treasury might make, within three months after the decision of the company should have been notified to them. It is to be observed that this warrant makes no specific mention either of the Arracan forces, or of the booty captured by them, and reserves the disposition of the property which the Ava force had destroyed to prevent it falling into the enemy's hands. The court of directors, in transmitting a copy of the warrant to the Bengal government, announced their resolution to give to the captors the moiety granted by the Crown to the company, and directed a distribution to be made in India to such of the forces as were there, and funds to be remitted to England for the payment of those who were in this country. On receipt of the warrant the Bengal government appointed a special prize committee; and they, acting upon express instructions from the governor-general in council, dated 7th November, 1833, commenced the distribution in India upon the basis of admitting all to be entitled who had received the donation batta (sanctioned in government

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general orders of August 3, 1826), that is, the Arracan forces as well as the Ava forces.

In November, 1837, before any distribution had taken place in England, Sir Archibald Campbell presented a further memorial to the Treasury, complaining of the proposed mode of distribution on several grounds; and amongst others, that the admission of the Arracan land and naval forces was not justified by the terms of the warrant, and was contrary to justice, inasmuch as General Morrison's troops had not been under his command, nor had been in any way instrumental in the capture of the booty. He specially referred to the *Deccan* case, and also to the fact that in the Peninsular war no joint sharing of booty had been allowed between the main British army under the Duke of Wellington on the one hand, and the land and sea forces employed on the south-east coast of Spain under Lord Exmouth and Lord William Bentinck on the other.

A copy of this memorial was transmitted to the East India Company, and they referred the matter to a joint political and military committee, who, in their report, dated the 11th April, 1838, stated as follows:

> It appears to your committee that the measures taken by the government upon the report of the prize committee, in obedience to the warrant, are generally correct. The only doubt which can be entertained on this head relates to the admission of the forces which served in Arracan to share in the booty. The committee are, however, decidedly of opinion that the participation of this force in the booty already granted ought not to be disturbed; and that if the terms of the royal warrant of September, 1831, are considered to be such as to preclude the payment of the share of that division out of the moiety granted to the army, the amount already issued should be charged upon the moiety granted to the company, and the amount given from this moiety to the rest of the army be diminished pro tanto, so that no additional charge may fall upon the revenues of India.

A copy of this report was sent to the Treasury, together with a memorial from the East India Company, praying for a supplemental warrant, in similar terms to the first warrant, for the grant of booty not comprised in the first warrant, namely, three lacs of rupees, estimated as an equivalent for the property destroyed to prevent it falling into the enemy's hands; and also certain sums of money, which had been discovered since the first warrant to have been realized by prize agents and invested. After much

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consideration, especially with respect to Sir Archibald Campbell's claims, the Treasury gave orders for the preparation of a warrant on the same principles as the former one; and the warrant actually received the royal signature. Before it was issued, however, Sir A. Campbell renewed his protestations, and in consequence, on the 26th of October, 1838, the Treasury suspended its issue in order to reconsider the subject, and to afford him an opportunity of making further representations. On the 27th of April, 1839, Sir Archibald Campbell presented a further memorial, with an appendix; the memorial contained the opinions of the then Queen's Advocate, the Attorney General (the late Lord Campbell), the Solicitor General (the present Lord Chancellor), Mr. Harrison, and Dr. Phillimore; all of whom, upon the case as presented to them on behalf of Sir A. Campbell, had pronounced against the admission of the Arracan forces. This memorial, and a long correspondence which ensued, seems to have had considerable effect upon the judgment of the Treasury, for on the 16th of March, 1840, they passed a minute, of which the following is an extract:

Par. 11. The only force entitled to share in this booty under the warrant is the force which captured it, or the combined military and naval force under the command of Sir Archibald Campbell and Commodore Grant. The sum which has been already paid to the Arracan force may, however, be charged upon the moiety of the booty granted to the company, and the amount given from this moiety to the rest of the army be diminished pro tanto, as proposed by the joint committee at the East India House, dated 11th April, 1838. But no portion of the sum which remains to be paid ought, in the opinion of my lords, to be given to the Arracan force. These observations equally apply to the naval portion of the Arracan force.

And the Treasury thereupon consulted the board of directors.

The answer from the court of directors, dated July 10, 1840, was to the following effect:

Their lordships having approved of the proposition that the sum which has been already paid to the Arracan force should be charged upon the moiety of the booty granted to the company, it will hardly be necessary to enter into the question whether that force under the command of Brigadier-General Morrison, which was intended to act under Sir Archibald Campbell, and was instructed by the governor-general in council to accomplish a junction with him on the banks of the Irrawaddy, ought not to be considered as included in the terms of the royal warrant of 11th of September, 1831. It should be remembered, however, that the services of that force were very distinguished, that the important diversion occasioned by its attack upon and capture of the island of Ramree, the fort of

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Chundore, and of the town and fort of Arracan, and the subjugation of the most productive of any of the provinces conquered from the Burmese by the British arms, must have contributed to the success of the principal division of the army; and that the high commendation passed upon the Arracan division, in the general orders of the supreme government of India, followed by the grant of medals to the troops engaged in the conquest of that province, and the distinction of bearing the word "Arracan" upon their colours, afforded strong grounds for the decision by the government that that force was entitled to share in the prize property captured during the Burmese war. It may be observed that some portion of it was actually captured by that force.

As a part of the prize property already distributed has been paid to that force as its due, the Court submit that a portion of the remainder, which is only the balance accruing from the same, and similar property, could not equitably be withheld; and they propose, therefore, that a further amount, corresponding with the sum that would now fall to the share of that force, shall be applied out of the moiety granted to the company, the part of that moiety granted to the rest of the army being as before diminished pro tanto.

This reply seems to have been hardly satisfactory to the Treasury, for on the 30th of July, 1840, they determined further to consult the India Board; and they requested that, in considering the question, the India Board would advert to the first decision in the *Deccan* case (contained in the Treasury minute of the 5th of December, 1823), and also to the opinion of the governor-general in council, in favour of the Arracan force, expressed in the letter of the 7th of November, 1833, already quoted.

This request of the Treasury had been in part anticipated, for the letter conveying it was crossed by one from the India Board, enclosing extracts of letters which that board had already written on the subject to the East India Company. The substance of these extracts was, that in the opinion of the board, even according to the tenor of the warrant of 1831, when considered in connection with the instructions originally issued to Brigadier-General Morrison, and with the course of his operations in Arracan, the force serving in that province ought to be considered as sufficiently connected with the main army to entitle it to a share in the booty. The position, also, of General Morrison, who at times had been within 100 miles of the Irrawaddy, was favourably contrasted by the India Board with that of Colonel Adams's division in the Deccan war, which was stated to have shared in the booty taken at Nassuck and elsewhere, though hundreds of miles from it at the time of the capture. This reference to

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Colonel Adams was evidently a confusion by the India Board of the second decision of the *Deccan* case with the first. The booty at Nassuck did not fall into British possession until after the Deccan army had been broken up, and Colonel Adams shared in it only under the second decision, which distributed it between both the armies engaged in the war.

Upon receiving the above-mentioned request of the Treasury for their opinion, the India Board wrote in reply a letter, dated the 7th of August, 1840, which is so important that it must be quoted at some length. After referring to the extracts of their letters to the board of directors, which had been already furnished to the Treasury, the letter proceeds:

The reference made to the decision of their lordships in February, 1823, relative to the Deccan booty requires some additional remark.

The rules laid down in that minute for the distribution of the Deccan booty are justly applicable where the principles there propounded can be fairly brought to bear upon the facts of the case; but the board consider that the circumstances of the war in the Deccan differ so far from those attaching to the war against the Burmese state, that the latter may properly be considered as one of those exceptions which their lordships appear to have had in contemplation in referring to cases in which the principle of constructive capture must be suffered to take effect.

The war in the Deccan was conducted against several powers, and upon a most extensive scale, and the booty captured was very large. Every opportunity was therefore afforded to carry out the principles which were laid down in the minute in question, and yet to give a liberal reward to each branch of the armies engaged in the campaign. But to adhere too rigidly to those distinctions in the case of the Burmese booty acquired in a contest with a single power, and in a much more limited sphere of operations, would have confined the reward arising from booty to one portion of the force, and have left the remainder, though highly distinguished, and by far the greatest sufferers, entirely unrewarded.

It has been shewn in the documents which the Lords of her Majesty's Treasury have received, that the Arracan force, upon a liberal construction of the facts, might fairly be considered as placed in a position which would include them under the terms of his Majesty's warrant of 1831, as a part of the force subject to the orders of Sir Archibald Campbell; and but for the dreadful effects of the climate of Arracan, which cut off or disabled more than was likely to have been incapacitated even in unfavourable Indian warfare, it would have actually joined the main army, having made some movements towards the Irrawaddy for that purpose, but being too weak to accomplish the junction. (1) It was capable, how-

(1) The Arracan division experienced the following casualties between May and September, 1825: The European force of 1500 men lost by death 259, and had in hospital nearly 400; ten native corps of nearly 8000 men lost by death 892 and had in hospital 3648.

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ever, of effecting an important diversion in favour of the main army, having detained for some time in the province of Arracan a considerable body of Burmese troops, with one of their ablest generals (Boondela) at their head, who afterwards commanded the force opposed to Sir Archibald Campbell; and it may thus be said to have facilitated the success of his brilliant efforts, and the capture of the booty now in dispute. The Arracan division succeeded, notwithstanding its reduced state, in subjugating one of the most valuable provinces that was acquired from the enemy, on account of its contiguity to the British territories, and its productiveness in point of revenue, while it was the province from which the title of the earldom conferred upon the governor-general at the conclusion of the war was derived.

The board feel assured that their lordships will not adopt a principle of distribution in this case which would go to exclude these brave men from participation in any part of the only booty that was captured. If they cannot be included in the grant under the late king's warrant, as the board think they might be, for the reason above stated, and as the actual captors of a portion of the booty (namely, the ordnance stores in the forts surrendered to them), they should at least be paid an equivalent out of the company's moiety. It is only by one of these methods that consistency will be observed in the recorded opinions and decisions of the several authorities, and in the directions hitherto acted upon in the distribution; for the Arracan force have received a share of prize properly not actually captured by them; and they may, in the opinion of the board, the more fairly claim upon the same principle a participation in the remainder.

This letter of the India Board was taken as conclusive, and accordingly on the 11th of August, 1840, the Treasury agreed to the following minute:

My lords refer to their minute of 26th October, 1838, directing that the issue of the warrant making an additional grant of the booty in question should be suspended, in order to give Lieutenant-General Sir A. Campbell an opportunity of more fully stating any objections to the manner in which the distribution was to be made.

My lords have accordingly received the further memorial of Sir A. Campbell, together with the appendix thereto; and having fully reconsidered the whole case, and obtained from the court of directors and the board of control the necessary explanations on the points which appeared to be involved in doubt, their lordships are now prepared to issue final instructions upon the subject.

My lords have carefully considered the statements contained in the letters from the court of directors and the board of control respecting the claim of the Arracan force to share in the booty; and they have come to the conclusion that, even supposing that the admission of this force to share in the booty was not contemplated in the original grant, the claims of the officers and men comprising it are of so strong a nature, that they cannot with justice be set aside in the distribution now about to take place; and their lordships are accordingly pleased to sanction the adoption of the same course on the present occasion as has been directed to be pursued in respect to the share which was given to this force in the distribution which took place in Bengal, viz. that an amount corresponding with the sum

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that would fall to the share of the Arracan force shall be applied for the benefit of that force out of the moiety granted to the company, the part of that moiety granted to the rest of the army being diminished pro tanto.

The Treasury then issued the supplemental warrant which had been prepared in 1838, and the issue of which they had hitherto suspended. This warrant granted the remainder of the booty to the East India Company, as to one half for the use of the company, and as to the other for the use of the commanders, officers, and men belonging to the army, navy, and marines employed in the war.

There is, therefore, no foundation for the statement that at the instance of Sir A. Campbell the Treasury caused to be rescinded the grant which had been made in favour of General Morrison, though they did for a time suspend the issue of the supplemental warrant. On the contrary, after a correspondence extending over several years, they adhered to their original decision. The distribution of the Burmah booty is an instance of the extreme latitude which has been sometimes allowed in the admission of claims of constructive capture. I doubt whether this decision is reconcileable with that of the *Deccan* case, and whether it may not in part have arisen from a misconception of that case. It seems to me that, if followed as a precedent, it might lead to the uniform admission of the whole of a local army to share in booty captured by any part. Certainly some of the reasons suggested by the board of directors and the India board, and apparently adopted by the Treasury, such as the sufferings of the Arracan force, their military achievements, valued irrespectively of their bearing upon the captures in question, are in my opinion extra-judicial and of a kind that cannot be entertained by this Court.

Bhurtpore, 1825-1826.

In 1825, war having been declared against the Maharajah of Bhurtpore, Lord Combermere, then commander-in-chief of the forces in India, on the 1st December took command of a body of troops assembled at Muttra, which is situated in the Agra district, on the south side of the Jumna, a few miles from the Bhurtpore frontier, and about thirty miles due north of Bhurtpore itself; from Muttra he advanced to Bhurtpore, and invested it. The fort was energetically defended, but after a siege of twenty-six days it was carried by assault on the 18th of January, 1826, the citadel was evacuated, and booty taken to the value of nearly half a million

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sterling. Immediately afterwards, detachments were sent out against sundry forts in the neighbourhood, which surrendered at discretion; the British were completely victorious, and two pergunnahs or districts were annexed to the dominions of the East India Company. In the warrant the booty was granted to the East India Company upon trust to retain one moiety for the proper use of the company, and to distribute the other moiety amongst the forces employed in the warfare, according to the usage of the army in India. In case of doubtful claims to share being advanced, the decision of the East India Company was to be final, upon the lapse of three months after the decision should have been communicated to the Treasury; till then the Treasury reserved to itself the right of making any order respecting such claims.

The only claim to which it is necessary to advert is that of the left wing of the 41st regiment of native infantry. This regiment had arrived at Muttra, on the Jumna, in October, had been included in the 4th brigade of the 1st division of the army by the general orders issued on the 3rd December by the commander-in-chief, and had been received in brigade both by the commander-in-chief and by the major-general commanding the division. When the army advanced towards Bhurtpore, the left wing of the regiment was ordered to remain at Muttra, as a detachment to protect the cantonment. During the whole period of hostilities it formed part of the army, made reports to and received orders from the head quarters of the brigade and division, and was constantly employed in escorting provisions and ammunition from the river Jumna at Muttra towards Bhurtpore, for the use of the besieging force. In common with the right wing of the regiment, and with the whole army, it also received full batta for the campaign. Upon the fall of Bhurtpore the commanding officer of the regiment applied for information whether the left wing would be entitled to share, and the answer which he received on the 15th of February from the adjutant-general was to the following effect:

His excellency the commander-in-chief considers, as a matter of course, the wing of the 41st regiment on duty at Muttra to be fully entitled to participate equally with the army actually present before the fort, in virtue of the regiment being brigaded with and necessarily forming part of that army, although the circumstances of the service fixed that portion of the 41st regiment at some little distance from the scene of action.

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In general orders subsequently issued by the commander-in-chief on the 12th of May, 1826, directing the prize rolls to be made up without delay, it was stated as follows:

> It is the opinion of the commander-in-chief that officers, non-commissioned officers, soldiers, and others entitled to share prize money, who may have joined the army, or holding situations in the army, may have crossed the Jumna for the purpose of joining or performing duty with the army, between the 9th December, 1825, the day on which the army entered the Bhurtpore territory, and the 18th January, 1826, the day of the assault (both days inclusive), are entitled to share equally with those who were present at the capture of the place.

The test eventually applied by the special prize committee to whom in the first instance all claims to share in the booty were referred, seems to have been whether the claimants had entered the Bhurtpore territory between the 9th of December and the 11th of January. Tried by this test, the claim of the left wing (as a whole) of the 41st regiment failed. Accordingly the prize committee, whilst admitting all escorts belonging to the left wing of the 41st regiment which had proceeded with provisions or ammunition to the besieging force, and which had in the performance of that duty crossed the boundary which separates the district of Agra from the Bhurtpore territory between the 9th of December, 1825, and the 11th of January, 1826, excluded the others belonging to the same wing who had remained at Muttra, on the ground that they had not entered the Bhurtpore territory. In this decision the governor-general in council concurred; but in consequence of the commander-in-chief being of a different opinion, the question was referred home to the court of directors; they confirmed the decision of the prize committee; the Treasury did not interfere, and the troops were accordingly excluded.

The above is a peculiar case, the position of the excluded troops having been exceptional in this respect, that, though brigaded with one of the divisions engaged in the actual capture, they never entered hostile territory. I quote it only because it tends to shew that in ordinary circumstances, where the whole of a division is in the field, a detachment, though not present at a capture made by the rest of the division, would nevertheless be entitled to share in the booty.

After the capture of Cabul in the year 1839, by the army of the Indus, under the command of Lord, then Sir John, Keane, Khelat, 1839.

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preparations were made for the return of the British army to India. The main body took its way eastwards through the Khyber Pass into the Punjaub; whilst the Bombay division, under the command of Sir Thomas Willshire, was ordered to proceed south viâ Ghuznee, in the first instance to Quettah, where General Nott was posted with troops in command of the Bolan Pass; thence to make an expedition against Khelat, whose chief had molested the army of the Indus in its passage through the Bolan Pass on its advance to Cabul; and finally to march to Kurrachee for embarkation. The instructions to Sir Thomas Willshire were signed by two authorities, viz. by Lord Keane, who was acting under the direct orders of the governor-general, and also by Sir William MacNaghten, who was then envoy and minister resident at Cabul. Sir Thomas Willshire was informed that he would probably receive direct instructions for his guidance from the governor-general, but that in the absence of such instructions he was to conform, so far as was practicable, to suggestions he might receive from the political agents in Shawl and Upper Scinde. He was also informed that Major-General Nott at Quettah would be directed to assist him.

Sir Thomas Willshire left Cabul on the 17th September, reached Quettah on the 31st October, but found that General Nott had already quitted that place, and had left there only the 31st Bengal Native Infantry, who were in such a sickly state, that with great difficulty 300 could be got together to go on to Khelat. With these troops added to his own force he marched upon Khelat, and carried it by assault on the 13th November, taking booty to the extent of 1,60,000 rupees. Thence he continued his march to the south, and ultimately rejoined Lord Keane's army, and was present with it when it was finally broken up at Sukhur on the Indus in January, 1840. I should add, that after leaving Cabul, which is 500 miles from Khelat, Sir Thomas Willshire received no further instructions from Lord Keane; he did, however, receive a letter direct from the government of India, fully explaining the views of the governor-general, both military and political, regarding the Khelat State. He reported the capture of Khelat to the governor-general, and not to Lord Keane, but for this he was at the time reprimanded by Lord Keane.

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Questions arose as to the persons entitled to the booty captured at Khelat. Sir Thomas Willshire claimed the whole for himself and the troops under his command exclusively. Lord Keane, on the other hand, claimed it for the army of the Indus, on the ground that Sir T. Willshire's forces were part and parcel of the army of the Indus, forming the Bombay column thereof; that they had been detached by instructions from himself as commander-in-chief of that army, and had remained under his command, until that army was broken up at Sukhur. He also claimed for himself the share of the commander-in-chief. The Treasury asked the Duke of Wellington for his advice, sending him the papers, and with them a copy of the first decision in the *Deccan* case, being the minute of the Treasury, dated the 5th of February, 1823. The opinion of the Duke of Wellington was thus expressed in the following extract from his letter in reply:

The minute of the Treasury of the 5th February, 1823, is perfectly well known to me; I have long acted under its provisions in my capacity of trustee for the distribution of the Deccan booty. But I must observe that in a very short period after the date of the minute it was found impossible to carry into execution its provisions, because it was found that, in point of fact, but very little of the property which was at the disposition of the Crown had been actually captured by the troops. It had fallen into the hands of the servants of the East India Company in consequence of the successful results of the operations of the war in general, and could not be deemed the actual capture of any particular body of troops. The greatest portion of the booty was divided on the principle of constructive capture, as described in the minute, among the troops of all the presidencies engaged in the operations of the war under the command of General the Marquis of Hastings, commander-in-chief.

Those portions of the property of which the actual capture was to be traced to any particular bodies of troops respectively were divided, each separately, among the body of troops which had actually captured the same.

According to this precedent, the division of the property captured at Khelat ought to be divided exclusively among the troops which, under the command of General Willshire, actually captured the same.

. . . . . .

From the perusal of these papers, it will appear that Lord Keane had no power to order the detachment under General Willshire to march to Khelat. It must have been ordered by the political resident; and General Willshire and the detachment of troops under his command stood, in relation to the commander-in-chief while so employed, exactly as he would if employed under the direct orders of the governor-general in council.

The statement of Lord Keane, that he gave orders to General Willshire when both were at Sukhur, has no influence on the question. It is believed that the rvice at Khelat was then concluded; at all events, Sir John Keane had quitted

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his command of the army of the Indus at Cabul. He had, it is supposed, gone from thence by the Khyber Pass into the Punjaub, and thence to Sukhur on the Indus, on his way to Bombay, of the army of which presidency he was the commander-in-chief. When at Sukhur it would have been his duty to give orders to General Willshire, who had successfully performed the service at Khelat on which he had been employed, in what manner to dispose of the troops, Bombay troops, which he had under his command.

Upon the whole, it appears to me quite clear that the capture of Khelat is one of actual capture under the minute of the 5th February, 1823, and that it ought to be disposed of accordingly.

Upon this opinion the Treasury acted, and accordingly a warrant was issued, dividing the booty exclusively amongst the troops which, under the command of Sir Thomas Willshire, had actually captured the same.

The *Khelat* case, therefore, is an example of actual capture. Its circumstances, however, were peculiar, and for this reason the importance of the decision consists chiefly in the express recognition, both by the Treasury and the Duke of Wellington, of the general rule of actual capture as laid down in the *Deccan* case

Scinde, 1843.

On the return of the army of retribution, as it was called, from Affghanistan in 1842, a portion of the force was concentrated at Sukhur on the Indus, whence it was intended that the Bengal troops should march eastward to their own presidency, and that the Bombay troops should go southward, to Kurrachee, for embarkation. Previous, however, to the dispersion of the force, information reached the governor-general that it was the intention of some of the tribes, at the instigation of the ameers of Scinde, to attack the Bengal troops on their march. Sir Charles Napier, who at that time was commander-in-chief of the forces in Bombay, was despatched to Sukhur, there to take the command of the troops in Scinde and Beloochistan. His first negotiations with the ameers were seemingly successful, and accordingly orders were given for the Bengal troops to proceed on their march homewards; but their departure proving to be the signal for a change of policy on the part of the ameers, Sir Charles Napier at once (at the end of December, 1842) crossed the Indus, and commenced a march southwards against the capital, Hyderabad, a distance of about 200 miles. He left behind him at Sukhur nearly three regiments; at Kurrachee, which lies 100 miles south-west of Hyderabad, there were at the time also three regiments. At

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Hyderabad itself was Major, afterwards Sir James, Outram, together with a small British force. Major Outram was the British resident at the Court, and had remained at Hyderabad, trusting to the assurances of the ameers, that the hostile attitude taken by some of the natives was without their sanction. However, on the 15th of February the residency was attacked, and, although the enemy was repulsed, Sir James Outram thought it expedient to embark with his detachment on board a vessel of war in the Indus, and thereupon the residency was plundered. In the meantime Sir Charles Napier, after making a digression to the east to capture a fort called Emamghur, continued his march along the left bank of the Indus, and on the 17th of February fought the great battle of Meanee, his own troops being assisted by the forces of Sir James Outram, who fired the Shikargah, or jungle, on the right of the army. The immediate consequence of the victory was the surrender of Hyderabad, the palace of the ameers was taken possession of, and booty captured to the amount of more than half a million sterling. Soon afterwards, however, Sir Charles Napier found himself surrounded by hordes of Belooches, and not being strong enough to attack them in the field, he entrenched himself in Hyderabad. At length, having obtained reinforcements by the aid of the Indus flotilla, he marched out of Hyderabad on the 24th of March, and after a severe engagement completely routed the enemy. Shere Mahomed, their leader, thereupon fled to the desert, but returned again with fresh hordes of Belooches, and on the 8th of June, after an insignificant engagement, he again fled, and the conquest of Scinde was completed.

Upon questions arising after the termination of the war as to the persons amongst whom the booty should be divided, the Treasury consulted the India Board upon several points, and amongst others as to "what scheme of distribution would, in the opinion of the commissioners for the affairs of India, most equitably meet the claim of all the parties who would be entitled to share in any grant which might be made." The reply of the India Board, after referring to some observations on the subject by the prize agents, was to the following effect:

The government of India has not transmitted to England any scheme of distribution, nor expressed any opinion upon that point.

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The board observe that in the case of the Deccan prize the Lords of the Treasury, although they desired to adhere to the principle of actual capture, felt themselves compelled to admit in some degree the principle of constructive capture.

And in the recent case of China, their lordships appear to have decided that all who were engaged in the operations undertaken against that country should share in the batta which was given in consideration of there being no prize, even though they could not be said to have contributed directly to the ultimate result of the war.

If the principle of actual capture were strictly adhered to in the distribution of the Scinde booty, the board presume that all but a small fraction of it would be granted to the troops engaged in the battle of Meanee, and that those who preserved it by gaining the battle of Hyderabad would receive little or nothing.

The board, however, are inclined to think not only that a portion, and a large one, should be given to those who fought in that battle, but that the troops stationed at the two extremities of Major-General Sir Charles Napier's command, Sukhur and Kurrachee, ought not to go entirely without reward.

The position at Sukhur formed the base of Sir Charles Napier's operations, and had it not been for the confidence which the force there gave him as to an attack upon his line of operations by the hostile Belooches who were assembling in force in his rear, he could hardly have ventured upon the march which he undertook; and his supplies and recruits were drawn both from Sukhur and Kurrachee.

Under these circumstances, the board are inclined to think that the whole force cantoned in Scinde at the time the battles of Meanee and Hyderabad were fought ought to share, more or less, in the distribution of the prize; and they would recommend the following as an equitable scheme for the partition of the booty:

The property to be divided into sixths:

One sixth to be given to all such of the troops stationed at or between Sukhur and Kurrachee on any day between the 17th of February and 24th of March, 1843, both included, as shall not be entitled to take a share on account of having been present at the battles of Meanee and Hyderabad.

With this portion of the troops should be reckoned such of the Indus flotilla stationed at or between Sukhur and Kurrachee as would not be entitled to a share on account of the battles.

And then, after stating that from the remaining five sixths should be deducted the amount of the six months batta which had already been given to the troops by the East India Company, the reply continues:

As to the sum that may remain after the deduction, the board recommend that it should be divided into two equal parts, one moiety to be given to the troops who fought at Meanee, and the other to those who fought at Hyderabad, the troops who were in both battles taking a share of each moiety.

The board likewise recommend that the troops under Lieutenant-Colonel Outram which were detached previously to the battle of Meanee, and directed to fire the Shikargah upon the right flank of the army, as well as the detachment which so gallantly defended the British residency on the 15th of February, should, if not otherwise included, share in the distribution of that portion of the prize set apart for the troops present in the battle of Meanee.

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The board is likewise of opinion that such portion of the Indus flotilla as was engaged in that defence, or co-operated with the detachment under Colonel Outram, or was in any other way employed in immediate connection with the army that achieved the victory of Meanee, should share in the same portion.

In like manner, the garrison of Hyderabad should be entitled to share in the sum devoted to those engaged in the second battle.

The Treasury adopted the advice of the India Board, and the warrant was issued accordingly.

The *Scinde* case is a case of the application of the doctrine of constructive capture, Kurrachee being 100 miles south-west of Hyderabad, and Sukhur 200 miles to the north. Nor were the forces at either of those places actually engaged with the enemy. It does not appear, however, that any effort was made to exclude them from sharing; and the unique proceeding adopted of admitting them upon inferior terms—one sixth only of the booty having been assigned to them, as compared with the five sixths distributed amongst the Meanee and Hyderabad forces—seems to shew that their admission at all was considered an act of favour rather than of right.

Moultan, 1848-9.

In the year 1848 the second Sikh war broke out. It began with an insurrection at Moultan, which was a prelude to the revolt of the whole of the Punjaub. General Whish commenced the siege of Moultan, but was soon obliged to discontinue it. In October the force destined for the reconquest of the Punjaub, and called the army of the Punjaub, was assembled at Ferozepoor; and in this force were included General Whish's troops, then still near Moultan. In the campaign which ensued, the army of the Punjaub, under Lord Gough as commander-in-chief, on the 22nd November fought the battle of Ramnuggur, and on the 13th January, 1849, encountered the enemy at Chilianwallah, after which it was forced to entrench itself, and subsequently to retreat. Meantime, in December, General Whish, having been reinforced by a detachment from Bombay, sent to him by the orders of Lord Gough, for whose army it had been destined, had resumed the siege of Moultan, and on the 22nd January he effected its capture. He then marched to join the army of the Punjaub, and on his way, on the 8th February, captured the fort of Chineout; on the 13th he reached the army, and on February 21st took part in the

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battle of Goojerat, which practically terminated the war. Both at Moultan and at Chineout he captured much booty, and at the close of the war he claimed the whole of it for himself and the troops under his command, to the exclusion of the rest of the army of the Punjaub, which had been on each occasion about 200 miles off.

The claim, however, was disallowed by the Treasury, who took the advice of the Duke of Wellington, and acted upon it.

The opinion of the Duke was expressed in the following terms:

> There can be no doubt that the army in the Punjaub under the general command of Lord Gough covered and protected the operations of the siege of Moultan, which had been undertaken by order of his lordship by troops detached from the army under his command under the superintendence of General Whish.
>
> All ought, therefore, to share in the booty captured at Moultan according to the general practice and custom of war, particularly in the East Indies; and Lord Gough should have the share of the commander-in-chief. General Whish would have the same share as the other general officers of the army.

The *Moultan* case, therefore, is an instance of joint capture, those having been admitted to share who had rendered material service to the actual captors. All that is important to observe is, that the Duke of Wellington thought this material service (that of covering and protecting the operations of the siege) had been rendered by an army which at the time was 200 miles distant, and in a partially disabled condition.

Delhi, 1857.

Early in May, 1857, an insurrection having broken out in Delhi, a force was hastily collected, called the Delhi Field Force. On the 30th May the first action took place with the rebels, at a place called Ghazee-ood-deen-Nuggur; the city was thereupon invested, and after several assaults was ultimately taken on the 14th September. Immediately after the capture it was thought expedient to attack some of the neighbouring disaffected chieftains, and accordingly there was formed from the Delhi Field Force a moveable column, strengthened by a detachment from the Hurrianah Field Force, the whole being placed under the command of Brigadier Showers. In the months of October and November this column captured certain forts about forty or fifty miles from Delhi, called Rampore, Jhujjur, and Bullubgur. Booty was taken at Delhi, and also in the forts.

Claim of

With regard to the booty taken at Jhujjur and the other forts

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a claim was presented by Brigadier Showers that the whole might be awarded to himself and the moveable column exclusively. This claim was not supported either by Major-General Penny, then commander of the Delhi Field Force, nor by his predecessor, Sir Archdale Wilson, who was consulted by Lord Clyde on the subject, and who thus expressed his opinion:

Brigadier Showers.

> Brigadier Showers' column formed part of the Delhi Field Force, was detached, and acted under the command of the officer commanding the field force. By all the usages of war, therefore, all lawful prize captured by such column should in my opinion be thrown into the general fund, and divided amongst the whole field force, and Brigadier Showers' column have no separate right to share such prize among themselves.

This opinion of Sir A. Wilson was approved of by all the authorities, Lord Clyde, the government of India, the India Office, the War Office, and ultimately by the Treasury.

Claim of Hurrianah Field Force.

Another claim was that of the Hurrianah Field Force to participate in the booty taken both at Delhi and at the forts. The grounds of this claim were thus stated by the General Van Cortland, the commander of that force:

> The force I have the honour to command has been in the field since the 8th of June last, and by its unremitting exertions the road viâ Sirsa to Delhi was re-opened. In August last General Wilson conveyed to me, through Lieutenant Hodson, his wishes that I should not proceed beyond Rohtuck, as the presence of my force in this district enabled him uninterruptedly to procure supplies.
>
> A portion of the mutineers from Delhi were defeated by me at Jumalpore on the 13th of September, a day previous to the attack on that city, and a large detachment from my force with the moveable column from Delhi took possession of Jhujjur and defeated the enemy at Kurnaul. Under these circumstances I trust that the services of my force will be considered as having assisted in the reduction of the city, and are thus entitled to share in the produce of its capture.

Sir Archdale Wilson, to whom this claim also was referred, after stating that the only occasion on which, during the siege of Delhi, he had communicated with General Van Cortland, was once when he had asked him to make a demonstration with his force towards Rohtuck or Bahadoor Ghur, and that then the general had replied that he was acting under special instructions, and could give no assistance, proceeded to declare his opinion that the Hurrianah Field Force had no claim to share in the prize money captured in Delhi; and this opinion was supported by the Indian government and the home authorities, and carried out.

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With regard to the booty of Jhujjur, &c., the Hurrianah Force were differently situated, for a detachment from that force had certainly been present at the capture. The question then arose, whether the whole of the force, or only the particular detachment, should be allowed to share in that booty. Eventually a decision was made in favour of the particular detachment.

Claims of Troops at Umballah and Kurnaul.

Other claims to share in the Delhi booty were put in, on behalf of troops stationed at Umballah and Kurnaul, distant respectively about 140 and eighty miles from Delhi on the road to Lahore, from which place came the Sikh reinforcement to the troops besieging Delhi.

These claims were also referred to Sir A. Wilson, who reported as follows:

> I do not consider that either Kurnaul or Umballah were posts of sufficient importance, or so far necessary to the investment of Delhi, as to found any claim on the part of the garrisons to participate in the division of the prize, either equally or in a diminished proportion with the troops actually engaged in the capture of Delhi. The garrisons of these posts partook of neither the perils, labours, or sufferings of the force before Delhi, and can have no greater claim than Ferozepore, Lahore, or Meerut. Donation batta, when given to the Delhi Field Force by the Indian Government, was not extended to either of these posts, which would have been the case had their services been considered of material importance towards the capture of Delhi.

This opinion was approved of by the committee appointed to advise the Secretary of State for War on the distribution of the booty captured in India, and was duly acted upon.

The same committee thus reported on the subject of the Delhi and Jhujjur booty:

> The committee are unanimously of opinion that all troops actually engaged in the operations which led to the re-capture of Delhi and its dependencies, Jhujjur, Bullubgur, &c., and they only, should participate in the booty taken at those places.
>
> The committee would define those operations to have begun with the action at Ghazee-ood-deen-Nuggur on 30th of May, 1857, which drove in the outpost of the Delhi rebels, and to have ended with the expulsion of the chiefs of Jhujjur and Bullubgur, which closely followed the fall of Delhi.

Eventually a warrant was issued directing that the whole of the booty captured at Delhi and Jhujjur should be thrown together, and divided amongst the forces engaged in the operations, as defined by the report of the committee.

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The *Delhi* case then would shew—

1. That the principle of actual capture should be followed; but that the siege of a city, and operations immediately following in the neighbourhood, though the whole may extend over several months, may be considered as one continuous operation.

2. That a capture by a detachment from a force should be referred to the whole of that force (case of Brigadier Showers); except that if such a detachment be temporarily incorporated with another force, it shares booty with the force with which it is so incorporated, but raises no title in favour of the force from which it was detached (case of Hurrianah Field Force).

3. That in case of a city captured after investment, no claims of joint capture can be maintained either by forces in the neighbourhood, which by their special instructions are prohibited from moving (Hurrianah Field Force), or by garrisons of neighbouring outposts, which are not necessary for the investment of the city (cases of Umballah, Kurnaul).

LUCKNOW, 1857-8.

As to the distribution of this booty, there seems to have been no serious question. The warrant awarded it to the troops "who had taken an active part in the capture of the city of Lucknow and its dependencies, or in the operations which had contributed thereto"; defined the operations "as having commenced with the first affair at Chinhut, and the investment of the residency by the rebels on the 29th June, 1857, and as having ended with the final expulsion of the rebels, and the capture of the city, on the 21st of March, 1858"; and in effect declared the troops which had taken active part in such operations to be as follows: The troops under Sir Henry Lawrence, which were originally shut up in the residency; the troops under Sir Henry Havelock, which in July had made an unsuccessful attempt for their relief, and in September had effected their entrance into the residency, but only to be themselves shut up there; the troops under Lord Clyde, which were engaged in his first expedition (in November) against Lucknow, when he succeeded in withdrawing the garrison safe from the residency to Cawnpore, but was obliged to abandon Lucknow itself to the rebels; the troops engaged in his second expedition (in March following), when he finally captured the city; and the troops under Major-General Windham, which during all these

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operations had held Cawnpore, and also the troops which had held intermediate stations between Cawnpore and Lucknow.

Subsequently a question arose under the warrant whether certain forces stationed at Futteypore were to be admitted to share in the booty. Futteypore is in the Doab, on the other side, therefore, of the Ganges from Lucknow, but not much further from it than Cawnpore, which is about fifty miles from Lucknow. A detachment also of the Futteypore Force had been still nearer, having held Dolamow on the northern bank of the Ganges. This claim was rejected, as not covered by the terms of the warrant. It is not difficult, I think, to understand why the Cawnpore Force were allowed to share, whilst the Futteypore Force were excluded. The fact was, the one position was considered material to the capture of Lucknow, the other not. Cawnpore guards the immediate approach to Lucknow; Cawnpore was the point from which the besieging forces had advanced, and to which they retired, and was necessary to their security throughout their operations; but the force at Futteypore, although no doubt it did good service by keeping open the road between Allahabad and Cawnpore, and by keeping the Doab clear of rebels, and although by threatening the Oude territory it may have drawn off a portion of the rebels from Lucknow, took no direct active part in the operations.

The *Lucknow* case, therefore, whatever be its value, is another declaration of the doctrine of actual capture. Indirect services were not recognised as a claim to share in booty. At the same time operations extending over many months, because strictly local, and indeed concentrated on a single point, were held to be continuous.

Dhar, 1857.

In the autumn of 1857, a revolt took place in the principality of Dhar. The town of Dhar lies about thirty miles to the west of the military station of Mhow, and about forty miles from Indore, the capital of Malwa, and the seat of the governor-general's agency for the Central India Provinces, an office at this time temporarily filled by Colonel Durand in the absence of Sir Robert Hamilton. For the suppression of the outbreak a force was, in the month of October, assembled under the command of Brigadier C. S. Stuart, called the Malwa Field Force, which at once marched against Dhar and invested it. Colonel Durand about this time

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sent orders to Major Orr, the commander of the field force of the Hyderabad Contingent, then on the south of the Nerbudda river, to advance to Mhow. Major Orr at once proceeded to execute this order, but his arrival at Mhow was delayed, partly because on his reaching Asseeghur he received an urgent requisition, with which he had to comply, from the deputy-commissioner, to turn aside to his assistance at Hindeah, and partly because he was required by Colonel Durand to diverge to Ragoghur to coerce a formidable insurgent there. On October 28th, Colonel Durand wrote to Major Orr that on his arrival at Mhow he would probably receive orders to join Brigadier Stuart's force with all practicable expedition, as Dhar Fort was holding out, and the column was weak in infantry. This anticipation was realised, for on the 30th Colonel Durand sent further orders that Major Orr, upon his arrival at Mhow, was to proceed without delay by the direct route to join Brigadier Stuart before Dhar. Accordingly Major Orr made forced marches upon Dhar, and arrived there on November 4th, but found that it had fallen two days before. Booty had been taken to the value of 70,000*l.* and upwards. In this booty Major Orr claimed to share, but his claim was rejected, and the doctrine of actual capture enforced.

Booty. Actual Captors.

Having thus examined, as I believe, the principal cases of booty, I proceed to state the conclusions of law to which I have come, and by which I shall regulate my judgment in the present case. In the first place, then, the general rule for the distribution of booty, to be adhered to as far as possible, is the rule of actual capture. It cannot be denied that in this respect the practice has been far from uniform, but on the whole the rule seems to be established. It is distinctly prescribed by the decision in the *Deccan* case, which is the most important of all, not only as having been the result of complete discussion of the subject, but as having been constantly referred to in subsequent cases as an authority. The adoption of actual capture as the general rule is quite in accordance with naval prize decisions, and, it may be added, with the practical convenience of the military service. On this last point I would refer to the recommendation of the royal commission appointed in 1864 to inquire into the realization and distribution of army prize:

To give, however, simplicity in all proceedings in matters of prize, and to facilitate despatch, it is essential that the principle of actual capture should be as

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closely adhered to as the nature of military operations permits. Any departure from this principle involves doubt, uncertainty, dissatisfaction, and delay; and any apparent want of equity which may arise from it in particular cases will, we believe, be willingly acquiesced in by the parties concerned, as in the similar case of the navy, as one of the proverbial chances of war.

With that recommendation I entirely concur. But, as in prize, so in respect of booty, circumstances frequently create a difficulty of fixing who shall be the actual captors, and that difficulty has to be met in the same way. The rule of actual capture, if pushed to an extreme, produces the very results to prevent which is the primary object of having a rule at all. To confine the enjoyment of booty to those who have actually laid hands upon the property would be simply to give legal sanction to lawless plundering. On the other hand, to distribute it indiscriminately would be to discourage personal efforts, and in many cases to dissipate the booty till it became insignificant. The line has to be drawn somewhere, and should not be drawn arbitrarily. I have come to the conclusion that the course which is most analogous to the rule of the naval service, most in conformity to military usage, and most likely to work satisfactorily, in the case of an army consisting of several divisions, is to draw the line between division and division.

The analogy between a division of an army and a ship of war is of course very imperfect; a division being much less a definite entity, and comprising a much larger number of men. But in the army divisional commands are well understood. The divisional general and the commander of a ship are alike selected for their ability to manage a force without the daily supervision of any superior; the one receiving orders direct from the commander-in-chief, the other from the admiral of the fleet or station. A division, like a ship, is large enough for efficiency as a separate force, and yet not too large to be day by day under the immediate and personal directions of the commander. No doubt, where a considerable army is in the field, as was the case in this campaign, the commander-in-chief is generally present with one division; often also a division is associated or co-operates with others; but still a division is frequently appointed to what may be called a distinct and separate service, if indeed not constituted for this very purpose.

Then, as to military practice, the principle of allotting booty to the division by which, or by detachments from which, it has been

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taken, was distinctly enunciated by Lord Hastings in the war against the Pindarries, and carried out in the decision in the *Deccan* case, the Lords of the Treasury refusing even to sanction an agreement between the different divisions to share in common. The same principle was enforced in the *Delhi* case, where the booty taken by Brigadier Showers' column went to the common benefit of the whole of the Delhi Field Force, from which it had been detached. Except under such circumstances as those relating to the detachment from the Hurrianah Field Force, which claimed a share in the Delhi booty, I know of no case where distinction has been made between detachment and detachment of the same division, both being in the field.

There are strong practical reasons against the adoption of any such distinction. The component parts of a division necessarily change places more frequently than the divisions themselves, and, if booty were taken on successive occasions, it would be almost impossible to ascertain which detachment of which division had been present at each of the several occasions. Even where the rule of actual capture is applied between division and division, the making up of the prize roll is always difficult; sometimes, as in the *Deccan* case, impracticable. A sense of hardship and disunion would be likely to arise if in the distribution of booty any distinction were recognised between those who are so closely associated as members of the same division.

My opinion is, therefore, that when prize has been captured by any portion of a division, that division is in the first instance to be regarded as the actual captor. The effect of this will be that, on the one hand, all the detachments of the division which are in the field will share, whether present or absent from the scene of capture; on the other hand, no other division will share unless it can make good its claim as joint captor, on the ground either of association or of co-operation.

Booty. Association.

I am not aware of any instance in which troops have been admitted to share as joint captors, solely on the ground of association irrespective of co-operation, irrespective, that is, of service actually rendered. But in the present case it is incumbent upon me to consider what sort of association will justify such a claim.

Those who claim to share in booty taken by others, not on

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the ground that they have in point of fact contributed to the capture, but on the ground that they were associated with the actual captors, are bound, in my opinion, to prove a strict association. In the first place it is clear that the association must be military and not political. Two bodies of troops are not associated together (so as to found a title to be considered joint captors) because they are carrying out parts of a political plan involving military operations, or because their commanders receive instructions from the same political authority, whether on the spot or otherwise. Next, there must be some limits even upon military association. In a certain sense the whole British army are associated together. It is not even enough that the association should be under the same commander, otherwise a whole local army, as being under one commander-in-chief, would share in booty captured by any portion of it. The true limits seem to me to be those indicated by the rule which practically obtains in prize cases, that the association must be under the *immediate* command of the same commander. After much consideration, I am of opinion that the preconcerted and complex character of military as compared with naval operations, does not render admissible a laxer association as a title to joint sharing of booty. It seems to be recognised in the army that with two forces under co-ordinate commanders, independent of each other, that there can be no unity of enterprise, inasmuch as the rules of the service provide that in case of a junction in the field, that is, in case of unity of enterprise being required, the senior of the two commanders shall take the command of the whole. So long as two divisions remain under commanders independent of each other, they have separate functions. True, one may contribute to the capture of booty by the other, but in that case the claim to share rests on the ground of co-operation, not of association.

To allow two or more divisions to be joint captors, if associated under the same immediate commander, but not otherwise, seems to be a legitimate expansion on the same principles of the general rule that all detachments of the same division share in common as actual captors, and that (in ordinary circumstances) separate divisions share separately. Association so defined has an intelligible, not a vague or constructive meaning. It is elastic enough for

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practical purposes, being equally applicable to temporary expeditions, and to long-continued operations; to the case of two divisions meeting in the field, and passing under the command of the senior officer, and to the case of a whole army, containing any number of divisions, all under the immediate command of the same commander-in-chief.

I dissent, therefore, from the view which would consider community of enterprise as alone constituting the bond of association; I mean the view that if troops are associated in a common enterprise it is not necessary for them to be united under the same immediate commander; for then divisions of the same army would never share separately, according to the rule prescribed in the *Deccan* case; and it would be quite impossible to place limits upon what should be considered a common enterprise.

There are two cases to which the above definition of association would not apply; one where there is a joint expedition of land and naval forces, the other where the British army is in the field with an army of an allied country. I mention these cases, but both of them depend on special considerations, and need not be treated here.

Booty. Co-operation.

The limits of naval co-operation are fixed by the rule of sight; but on land, as I have already said, that rule is altogether inapplicable, and has in fact no counterpart. It was argued, indeed, that communication was the counterpart; that is, that land forces mutually communicating hold the same relations to each other as ships in sight. But I cannot agree to this argument, inasmuch as communication on land can take place at almost any distance, whereas sight at sea is of course strictly limited. It is obvious, however, that, as with association, so with co-operation, some practical limit must be placed upon the use of the term, when considered as the foundation of a title to joint capture. Co-operation is an ambiguous term. In a certain sense, every British regiment, every British soldier, co-operates with every other, not only in India but throughout the world. In a certain sense, the successes, the very existence, of any British troops, if only known, occasion encouragement to the friend and intimidation to the enemy, wherever the friend and enemy may be. But such co-operation cannot, it is manifest, be admitted as a title to joint

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sharing of booty, without a total abandonment of the general rule that booty should be awarded to the actual captors. Regard for the principle which underlies the naval prize decisions, and deference to what has been in the main the usage of the army, alike require me to hold that the co-operation which is necessary is a co-operation directly tending to produce the capture in question. What tends to produce a capture it is impossible to define once for all. Circumstances are infinite, and the combination of them beyond human foresight. Each case must be judged on its own grounds, and all the facts duly considered, the mode of warfare, character of capture, &c. Speaking generally, I can only say that strict limits must be observed of time, place, and relation. Services rendered at a great distance from the place of capture, acts done long before the capture was contemplated, even though they affect the whole scene of operations, cannot be deemed such co-operation as will give a title to share in booty. Indirect services will be insufficient. Thus, to take an instance from the present war, it may well be, that if Delhi had not been taken, or Lucknow reduced, it would have been more difficult, if not impossible, for the Central India forces to have accomplished their march, or to have mastered the great cities and strongholds of the enemy; but it has never been suggested that for that reason Lord Clyde's forces north of the Ganges could claim as joint captors of booty taken by Sir H. Rose or General Whitlock.

On this head I may conveniently refer to the judgment in the *Dordrecht.* (1) The circumstances of that case were indeed different from the present, inasmuch as it was a claim preferred by British troops to be held joint captors with the British fleet of certain Dutch vessels taken in Saldanah Bay. But Lord Stowell's words, in my opinion, indicate the true principle applicable to all cases. He says:

> I am strongly inclined to hold that, when there is no preconcert, it must be not a slight service, nor an assistance merely rendering the capture more easy or convenient, but some very material service, that will be deemed necessary to entitle an army to the benefit of joint capture . . . Where there is no privity of design, and where one of the parties is of force equal to the work, and does not ask assistance, it is not the interposing of a slight aid, insignificant perhaps and

(1) 2 C. Rob. 64, 65, 71.

not necessary, that will entitle another party to share. The services which I should require must be such as were directly or materially influencing the capture, so that the capture could not have been made without such assistance, or at least not certainly and without great hazard . . . The principle of terror must be of terror operating, not mediately and with remote effect, but directly and immediately influencing the capture.

I now proceed to the case itself. But before I enter upon the facts I will deal with two arguments which were advanced, as it were, on behalf of all the defendants. It was suggested that the capture of Banda and Kirwee was the result of the whole war; and therefore that the booty (upon the principle of the second decision of the *Deccan* case) should be distributed amongst all the troops engaged in the war. This seems to me contrary to the facts. The booty taken at Banda and Kirwee was taken in the daily operations of the war, and beyond question General Whitlock's forces were the actual captors.

Another argument, which I have rejected by anticipation, is that based upon the strategic plan of the whole campaign. It was urged that in the present case the strategic enterprise was for three columns to start simultaneously from Madras and Bombay in the south, to advance northwards in parallel lines, and sweep the country up to the Jumna, the centre column being the advanced or fighting column, the flank columns having to support it and to prevent the enemy breaking away to the right and to the left, whilst the front and north were closed by the forces in the Doab; and that the booty taken by any of the troops engaged in this strategic enterprise should go to form a common fund for distribution amongst all. Now, not to say that this strategic enterprise was no smaller a combination than one, to use the words of the general order issued at the end of the war, "spread over a surface ranging from the boundaries of Bombay and Madras to the extreme north-west of India," it is manifest that this theory of military association proposes an entirely novel rule for the distribution of booty, and one which once for all would supersede the rule of actual capture.

It remains to be seen whether such association or co-operation with General Whitlock's troops as I have above laid down to be

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necessary to support a claim of joint capture can be established by the several claimants; and for this purpose the case of each must be examined separately.

I will commence with the claim of Sir Hugh Rose and the Central India Field Force. In order to do justice to this claim, to ascertain, that is, the relation of Sir Hugh Rose and General Whitlock and their forces to each other, it is necessary to review the whole campaign of both the columns, and to examine in detail many particular acts done by either commander therein. I have endeavoured to state the circumstances with accuracy, but the task is a difficult one. There is no continuous narrative before the Court such as can be accepted as evidence; the facts have to be picked up piecemeal from the multitudinous and lengthy documents printed without order or selection, the only guide being the extracts read by counsel at the hearing of the cause; moreover, many most important documents are missing.

Movements of Sir H. Rose and General Whitlock.

On the 18th of October, 1857, Lord Clyde, then Sir Colin Campbell, submitted for the consideration of Lord Canning, as governor-general for India, a memorandum (1) relating chiefly to the organization and movement of columns from the two Presidencies of Madras and Bombay through Central India, but also, as it would appear, to troops for Scinde and the Punjaub. His proposal with regard to the two presidencies was briefly this: One column should be formed from each presidency; the Bombay column should start from Mhow in two divisions, both divisions, however, being under the same commander, Sir Hugh Rose, the larger division (two-thirds) marching by the direct road on Jhansi and Gwalior, the other (one-third) branching off to Saugor, where it would halt for orders, the orders contemplated being either that it should be broken up for stations, or continue its march. The Madras column should be led by Sir Patrick Grant, and should march towards Nagpore, and be directed ultimately on Jubbulpore. Lord Clyde adds: "A communication would of course be opened by this column with that coming from Mhow towards Saugor."

Formation of General Whitlock's force.

This memorandum of Lord Clyde's was considered by the governor-general in council, and their opinions are recorded in a minute (2) dated the 13th November, 1857. The minute dealt

(1) III.—17, 18. (2) III.—56, 57.

exclusively with the Madras presidency, the arrangements for Bombay being expressly reserved, except that it contained an allusion to the necessity that had arisen since Lord Clyde's memorandum for an additional column from Bombay for Rajpootana. With regard to the Madras presidency, the minute practically adopted the arrangements suggested by Lord Clyde, except that it proposed that the command of the column should be given to an officer to be nominated by the Madras government, instead of to Sir Patrick Grant, whose services would be required at Fort St. George.

On the same day (the 13th of November, 1857) instructions (1) in accordance with this minute were despatched by the government of India to the Madras government for the advance of a column from the Madras presidency northwards, to serve in Nagpore and beyond the Nerbudda. The instructions state:

It is the wish of the governor-general in council that the force should be directed through the Nizam's dominions to Nagpore, and eventually to Jubbulpore. Whether it will be necessary to call the force further beyond the Nerbudda to Saugor or elsewhere is yet uncertain. It must depend upon the work which the column from Bombay may have in hand in Rajpootana or in the western portion of Central India, after it shall have assembled in the month of January, and upon the course of events in Bundelcund, Central India, and Oude, which may possibly occupy the force in Bengal, and make it necessary to leave the Saugor territory to the care of the Madras column.

It is the desire of the governor-general in council not to draw that column further northwards than can be avoided, but it must be prepared to operate even beyond Saugor, if required.

A copy of these instructions of the 13th November to the Madras government was on the same day forwarded by the government of India to the civil and military authorities of Bombay. (2)

The instructions of the 13th November from the government of India to the Madras government do not seem to have reached Madras till the 20th (3), by which time they had been in some measure anticipated; for in consequence of an application by Mr. Plowden, commissioner of Nagpore, the Madras authorities had of their own accord (November 12th to November 17th) directed (4) the organization of a force for service in the Nagpore, Saugor, and Nerbudda territories, had appointed Brigadier Whit-

(1) III.—58. (2) III.—59. (3) III.—92. (4) III.—52, 63, 64.

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lock, then at Kurnaul, to the command, had issued (1) to him instructions for his conduct, and on the 17th had informed the government of India of the arrangement. On the 20th November, when the instructions came from Calcutta for the formation of the Madras column, the only change which the Madras authorities thought necessary (2) in order to give effect to the wishes of the government of India was to make an addition of troops to the force already constituted. An order for this purpose was passed immediately; and on the same day, the 20th, the government of India were apprized of what had been done, and on the 2nd December they expressed their approval of the same. (3) I do not here consider the instructions (4) (to which I have already referred) given to General Whitlock by the adjutant-general of the Madras army, for they throw no light upon the destination of his force beyond that it was to be employed in the disturbed Saugor and Nerbudda districts.

Formation of Sir Hugh Rose's force.

The purport of Lord Clyde's memorandum of the 18th October, which related to the formation of a Bombay column, has already been stated.

On the 21st November the government of India addressed (5) the government of Bombay, directing a Bombay column to be organized for service in Central India and Malwa, the column to march in the first instance to Mhow, and thence to operate where most needed along the line of the Nerbudda or towards Gwalior; on its approach to Saugor or Bundelcund it might possibly be reinforced by troops from Bengal; the command was to be entrusted to Sir Hugh Rose. If possible, a second column was also to be formed to march to Rajpootana either from Cutch or by way of Ahmedabad.

Such was the purport of the instructions; and just as a copy of the instructions for Madras had been forwarded to Bombay, so a copy of these instructions for Bombay were on the same day, the 21st of November, forwarded to Madras. (6) And, like the Madras government, the Bombay government had also in a great measure anticipated their instructions. As early as the 16th of November the governor of Bombay in council had recommended (7) that

(1) III.—76, 127. (2) III.—89, 90, 92. (3) III.—120.
(4) III.—37. (5) III.—96-98. (6) III.—99. (7) III.—68, 69.

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two columns belonging to the presidency, viz. the Malwa Field Force, under Col. Stuart, and the Deccan Field Force under Col. C. Steuart, which was under orders to march to Hoosingabad and perhaps to Saugor, should be combined and placed under the command of Sir Hugh Rose; and orders had been issued accordingly on the 25th of November (1), that is, before the instructions of the 21st had arrived from Calcutta. On the 5th December the Bombay government informed the government of India that the two columns had been united under Sir H. Rose, and had received the distinguishing name of the Nerbudda Field Force. (2) On the 9th December the Bombay government applied (3) to the Madras government to know whether it would be possible to detach "any of the native cavalry or infantry of the Madras army to swell the gross force of the columns formed for operations from the Bombay presidency in Rajpootana or in Central India upon the line of the Nerbudda;" and on the 24th (4) the Madras government wrote back to say it was impossible, but added, "The Bombay columns will, however, be at least indirectly supported by the division forming for service in the Saugor districts under Major-General Whitlock."

The particular instructions to Sir H. Rose, if any were given to him upon the occasion of his appointment, are not now forthcoming.

It is impossible to read these documents which I have already referred to, without perceiving that the government of India was unable to issue any precise orders. The state of things was wholly uncertain. Thus it might seem doubtful as to which of the two forces, Sir H. Rose's or General Whitlock's, was primarily destined for Saugor. But what subsequently passed shews that it was soon settled, that General Whitlock should march straight on Jubbulpore and Saugor, and that Sir H. Rose should clear the Grand Trunk Road, which leads from Indore through Gwalior to Agra lying more than a hundred miles to the west of Saugor. However, at the end of November, and early in December, Major Erskine, the commissioner of the Saugor division, finding that the Madras column could not be expected to arrive till the middle of January, and that affairs in the Saugor and Nerbudda terri-

(1) II.—201. (2) III.—123. (3) III.—124. (4) III.—144.

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tories were too critical to admit of delay, pressed for military assistance from Bombay. His first (1) application was that Brigadier Steuart commanding the Deccan Field Force at Hosungabad (part of Sir H. Rose's force) should be moved on to Jubbulpore. This application was, on the 12th December, forwarded to Sir H. Rose by the Bombay government with the following instructions, which it is necessary to set out at length, because they throw light upon the general destination of Sir H. Rose's force.

2. II.—199.

(No. 3217 of 1857.—Secret Department.)

From H. L. ANDERSON, Esq., Secretary to Government, Bombay, to Major-General Sir HUGH ROSE, K.C.B., Commanding the Nerbudda Field Force; dated 12th December, 1857.

SIR,

1. . . .

2. In forwarding this correspondence, I am desired to observe that the right honourable the governor in council considers the first object to which your attention should be directed to be the complete restoration of the authority of government in those parts of Malwa and Central India which adjoin the territory of this presidency. Holkar's troops and the Bhopal contingent are both deeply implicated in the rebel cause; and, until they are disposed of, his lordship in council is of opinion that it would expose your communications to interruption, and even the presidency to possible danger, if you were to leave them in your rear.

3. When this primary object has been completely effected, the right honourable the governor in council considers that the principal points to which your attention should be directed are the re-establishment of the direct communication with Agra, and the restoration of order in the Saugor and Nerbudda territory, and in the Bundelcund states.

4. This government knows little or nothing of the internal and political condition of the country north of the Nerbudda, and the right honourable the governor in council thinks it would be very inexpedient for the government to lay down the plan of a campaign for the column under your command; but his lordship in council would remark that Jubbulpore lies altogether to the eastward of the line of operations which he conceives your column should undertake.

5. It appears to the right honourable the governor in council that Jhansi and Saugor, or rather Nowgong, are the points which you should consider as the destination of your force rather than any place further to the east, and that from these points you will be able to co-operate with the commander-in-chief in India, and to cut off the retreat of the Gwalior contingent, or of the Dinapore mutineers, or of any other rebel force which may endeavour to fall back upon Bundelcund and the strong country north of the Nerbudda.

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(1) II.—200, 291.

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6. The right honourable the governor in council has not, however, the least desire to underrate the importance of Jubbulpore; and if, when Indore and Bhopal are settled, you find that you are strong enough to detach a portion of your force to its assistance, he would by no means prevent your doing so. Looking, however, at the position of Jubbulpore in the map, it is evident to his lordship in council that a force could be sent much more quickly from Nagpore, or even from Allahabad, than from Mhow, or from any Bombay station.

I have, &c.
(Signed) H. L. ANDERSON,
Secretary to Government.

On the 22nd of December, Major Erskine addressed Sir H. Rose himself, and urged upon him that he should use the option left to him by his instructions of the 12th of December to advance to Saugor. Saugor was in a critical state, and it would be unsafe to leave it without protection till the arrival (1) of General Whitlock at the end of January. Saugor is, as its name imports, the Saugor and Nerbudda territories; not, therefore, in Central India, but sometimes called "the key to all Central India." (2) It contained a large and valuable arsenal (2), and at this time was a refuge to some 150 (1) British women and children; the garrison was weak, and immediately outside in cantonments were 1000 Bengal sepoys, who, though they had not as yet exhibited any inclination to mutiny, were necessarily an object of suspicion and alarm. The surrounding district was in a state of the most lawless disorder (3), and the rebels were in possession of several strong forts in the neighbourhood, as Ratghur, Garrakottah (1), &c. Thus the inhabitants of the fort were practically shut up and beleaguered.

Nevertheless, the suggestion of Major Erskine that Sir H. Rose should march to Saugor, did not at first meet with the approval of Lord Elphinstone, who evidently thought it better that Sir H. Rose should adhere to the original plan of opening the Grand Trunk Road from Bombay to Agra. He thus wrote to him on the 4th of January:

II.—210.

Extract of a Letter from Lord ELPHINSTONE to Sir H. ROSE, dated 4th January, 1858.

'I have suggested to him that as General Whitlock will probably reach Saugor with his column early in February, and if that place is not immediately

(1) II.—205. (2) VI.—93. (3) IV.—46.

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threatened it would be as well to adhere to your original plan of opening the direct communication with Agra, at the same time cutting off the Kotah and Rajpootana rebels from Bundelcund and Oude. This might be done by taking Jhansi, or even by holding Sepree. One great advantage from taking this line is that you would place yourself in communication with the commander-in-chief, who is now advancing from Cawnpore up the Doab; his force is moving in two parallel columns, one on the right bank of the Ganges, the other on the left bank of the Jumna. Sir Colin Campbell hopes by this means to clear the Doab of mutineers and rebels. The two columns are ordered, I understand, to unite at Mynpooree. But upon this point (of your movements) Sir R. Hamilton and yourself are much better judges than I can be.

If the difference of a week, or perhaps a fortnight, in the relief of Saugor is of importance, that place, of course, must be first attended to; if it can wait for General Whitlock's advance, the other movement appears to me the most desirable. At the same time, I believe that there are mutineers at Bhopal to be punished; but probably Colonel Steuart, who is now at Sehora, might be strong enough for this.

But two days afterwards, on the 6th January, Lord Elphinstone changes his mind, and thus writes to Sir H. Rose:

II.—211.

Bombay, 6th January, 1858.

MY DEAR ROSE,—Sir Robert Hamilton is anxious that Saugor should be first relieved. I have, of course, nothing more to say. There can be no doubt that Saugor is in a position of some danger, for its safety depends upon the fidelity of a regiment of Bengal sepoys. I hope that you will arrive there in time to prevent any disaster, and that you will then be able to turn your face towards Tehree and Jhansi, leaving Jubbulpore and Eastern Bundelcund to the Madras column under General Whitlock. By turning to the north you would have a better chance of intercepting the Kotah rebels, and you would place yourself in communication with the commander-in-chief.

Believe me, &c.

(Signed) ELPHINSTONE.

Sir Hugh Rose upon this prepared to march himself with his second brigade to Saugor, and to leave to his first brigade, under Brigadier Stuart (who had commanded the Malwa Field Force) the work of clearing the Grand Trunk Road from Bombay to Agra. On the 11th, Sir H. Rose started from Indore. But just before starting he telegraphed for permission (1) that his force might change its name; some confusion having already arisen in consequence of his force being called the Nerbudda Field Force, whilst the Madras column was entitled the Saugor and Nerbudda Field Force. He therefore begged that the Bombay column under his command might be designated "The Central India Field Force." He was ac-

(1) III.—151.

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companied by Sir Robert Hamilton, whose name has been already mentioned. Sir R. Hamilton was the governor-general's political agent in Central India, which would include (amongst other territories) Gwalior, Rewah, and Bundelcund (1); in addition he had had transferred to him the political functions in respect of the chiefs of the Saugor and Nerbudda territories, (2) which had been temporarily exercised by the commissioner of those territories (Major Erskine) under the lieutenant-governor of the north-western provinces; and subsequently, in February (3), he was further invested with temporary authority over Major Erskine and other civil officers attached to the Saugor division. Thus the political charge of the whole country contemplated as the scene of operations, not only for the Bombay column, but also for the Madras column, was in the same hand: and Sir Robert Hamilton, as having such charge, possessed authority to make requisitions upon either Sir Hugh Rose or General Whitlock.

March of Sir Hugh Rose from January 11 to March 15. Raatghur, Barodia, Saugor, Garrakottah, en route to Jhansi.

Sir H. Rose, on the 29th of January, captured the fort of Raatghur (4), on the 31st defeated the enemy at Barodia, and on the 3rd of February relieved Saugor. (5) The immediate effect of his arrival at Saugor was to set free the beleaguered garrison and British inhabitants of the fort, and to make possible the restoration in some degree of order in the district. (6) From Saugor Sir H. Rose made an expedition against Garrakottah, a very strong fort in the neighbourhood to the south-east deemed (7) by the natives to be impregnable. However, on his approach, on the 10th February, the rebels evacuated the fort.

On the 14th February, Sir Hugh Rose returned to Saugor, and on the 27th started en route for Jhansi. Jhansi had been mentioned in the original memorandum of Lord Clyde of the 18th of October as one of the objects of the Bombay column, and again in Lord Elphinstone's letters of the 4th and 6th of January. On the 24th of January the chief of the staff had written to Sir R. Hamilton:

Sir WM. MANSFIELD to Sir R. HAMILTON.

January 24th, 1858.

When may we look to feel the influence of your march? We learn by the telegraph that you are bound for Jhansi. Your arrival at that point would not, I

(1) I.—60. (2) IV.—27. (3) IV.—65. (4) IV.—28.
(5) IV.—37. (6) IV.—46. (7) IV.—48.

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presume, take place before the middle of March—very late for the commencement of a siege. Sir Colin will be glad to learn if Jhansi is to be fairly tackled during your present campaign. To us it will be all-important. Until it takes place, Sir Colin's rear will always be inconvenienced, and he will be constantly obliged to look back over his shoulder, in the same manner as when he relieved Lucknow. The "stiff neck" this gives to a commander-in-chief, and the increased difficulty of his operations in consequence, you will understand.

And on the 3rd February, Sir H. Rose had written to General Whitlock:

My orders are to advance to Jhansi as speedily as possible, taking of course the forts, and subduing the country in the hands of the rebels which are between Saugor and Jhansi. Besides the great advantage of restoring the country between Saugor and Jhansi to the government, it is of the utmost advantage that I should advance as quickly as possible to the north, in order to clear the left rear of the army of the commander-in-chief against the rebels.

Subsequently, however, some fear was felt lest the forces of Sir H. Rose should be insufficient for the siege of Jhansi, for on the 11th of February, Lord Canning wrote (1) to Sir R. Hamilton, and the chief of the staff wrote (2) to Sir H. Rose, suggesting that, if the siege could not be prudently undertaken, the march of the Central India column might be directed in two divisions, one on Kalpee on the Jumna through Chirkaree, and the other on Banda. Whether these letters came to hand or not there is no evidence to shew, but it is certain that Sir H. Rose persevered in his intention to move from Saugor at once on Jhansi.

On the 18th February he sent a message from Saugor to the governor-general (3), thus describing his future plans:

Under these circumstances I shall not play the game of my enemy, but take the road to Jhansi, then through the more open country by Khirl, striking off thence to Chundairee, skirting in this way the dangerous part of Bundelcund, falling, if I can, on the flank or rear of any strong position of the enemy assisting Tehree, and getting into communication with my first brigade, which is to arrive at Goonah about the 28th instant. I shall make it a combined attack on Jhansi.

If the commander-in-chief would have the goodness to reinforce me at Jhansi it would be advantageous.

Sir H. Rose was unable to leave behind him at Saugor any men to reinforce the garrison (4); he simply left a small body to escort

(1) II.—225. (2) III.—224. (3) IV.—64.

(4) Wheler's Proofs, 2.

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some supplies to his camp. (1) On the 1st of March (2) he cleared Barodia; and on the 3rd (2) he forced the pass of Muddinpoor to Pepria. This was a movement of considerable importance; it divided the rebels of Banpoor from the rebels of Shahghur; it enabled Sir H. Rose to communicate with his first brigade at Esaghur or Chundairee, and gave him command of the whole country up to Jhansi, except two or three small forts. On the 4th of March (3) the force occupied the fort of Sirai, a favourite resort of the Rajah of Shahghur, and Sir R. Hamilton publicly declared the annexation of the whole state of Shahghur. On the 9th of March (4) the force quitted the Saugor district, having, according to Sir R. Hamilton's statement, cleared it of all bodies of rebels and mutineers, and they then proceeded en route to Jhansi.

March of General Whitlock, January 10 to March 16. Kamptee, Jubbulpore, Dumoh, Saugor.

General Whitlock on the 10th of January reached Kamptee (5) on the frontier of the Saugor and Nerbudda territories; remained there for a fortnight; on the 23rd (5) started for Jubbulpore, a town on the Nerbudda, about 150 miles due north of Kamptee; reached it on the 6th of February (6), and after staying there a few days proceeded by the Deccan Road (7), to Jokahie, and thence to Dumoh, which he reached on the 4th of March. As his future contemplated operations were against various strongholds in the neighbourhood of Dumoh, he left there the main body of his force, and removed the headquarters of his division to Saugor, for the purpose of arranging for the strength of its garrison and their accommodation. On the 13th of March he quitted Saugor, leaving there a detachment (8) of the 3rd Madras European Regiment and 50th Madras Native Infantry; returned to Dumoh; and all necessary preparations were made to take the field in three different directions, when, on the 16th of March, there were received in camp instructions from the governor-general which changed all his previous plans. (9)

The receipt of these instructions is a cardinal point in the history of the operations of the two columns. I will, therefore, here pause to refer to the communications that had already passed between their respective commanders. It would seem that as soon

(1) IV.—89.
(2) IV.—86, V.—16, V.—176.
(3) IV.—90.
(4) IV.—101.
(5) III.—221.
(6) Plt.'s Supplements, 30.
(7) II.—219, 222, IV.—91.
(8) Wheler's Proofs, 28.
(9) III.—222.

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as Sir Hugh Rose and General Whitlock found themselves within reach of each other, they began to correspond. It is unnecessary to set out these letters (1) at length; they do not carry the case further. Suffice it to say that the two officers from time to time interchange information as to the strength of their respective forces, their doings, and projected operations. Sir H. Rose announces his intention to advance as speedily as possible to Jhansi, so as to clear the left rear of Lord Clyde's army; states his instructions that the two columns are to give each other mutual assistance, and suggests to General Whitlock to clear the valley of the Nerbudda so that Major Western (the deputy commissioner of the Saugor and Nerbudda territory) may be able to send supplies to the Bombay column. Also he twice begs General Whitlock to furnish him with transport, once for grain and another time for pontoons, but on each occasion General Whitlock was prevented from complying with his request.

Order of March 13, to march to the relief of loyal chiefs in Bundelcund.

The order which General Whitlock received when near to Dumoh on the 16th of March, and which, as he states, changed all his plans, was an order to march to the relief of the loyal chiefs in Bundelcund. Before considering the terms of this order, or the consequences it produced, it will be convenient to state the circumstances which led to its being given.

General Whitlock advances to Punnah. Sir H. Rose perseveres in his march to Jhansi.

Bundelcund (2) is a territory of about 200 miles from S.E. to N.W., and 155 miles from S.W. to N.E. It is bounded on the west and north-west by Gwalior, on the north-east by the Jumna, on the east by Rewah, and on the south by the British territory of Saugor and Nerbudda. In quite the early part of the century Bundelcund was one of the territories under Mahratta rule; the nominal chief of the Mahrattas was originally a rajah, but the real

(1) Sir H. Rose to General Whitlock 3 February, 1858, II.—220.
" " 7 " " II.—218.
" " 13 " " II.—223.
" " 9 March " Supplement V.
" " 18 " " II.—236.
General Whitlock to Sir H. Rose 1 February " II.—216.
" " 12 " " II.—222.
" " 16 " " II.—219.
" " — " " Supplement V.
" " 9 March " Supplement V.

(2) Thornton's Gazetteer, 153.

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power had long passed to the rajah's hereditary lieutenant, called the Peishwa. But, before 1820, the Mahratta power had been broken by the English; and the last Peishwa ceded to the East India Company all his rights in Bundelcund, and retired to Bithoor, a holy city on the Ganges, as a pensioner of the British Government. He adopted as his successor Nana Sahib, but the British Government refused to recognise the title by adoption; and this refusal, no doubt, was the chief grievance of the Nana.

The province of Bundelcund consists partly of British districts, where the native sovereigns are only titular, and the judicial and fiscal management appertains to the lieutenant-governor of the north-west provinces; partly of native states, over which the governor-general's agent for Scindia's dominions and Bundelcund exercises a political superintendence. Amongst the native states are, Adjghur, Chirkaree, Chutterpore, Punnah, Tehree. Jhansi, also, until a short time before the mutiny, had been a native state, but upon the death of the late rajah, Lord Dalhousie refused to recognise a son whom he had adopted, and Jhansi was declared to have lapsed to the British. The ranee, the rajah's widow, however, refused to acknowledge the British right, and on the mutiny breaking out joined the rebel cause, and became one of its most active leaders. Amongst the British districts of Bundelcund were, Banda, Kalpee, Humeerpore. Kirwee, otherwise called Tirohan, is a part of Banda. The Nawab of Banda (1), upon the mutiny breaking out, seems to have saved the lives of the Europeans, but subsequently, taking advantage of the disorder, attempted to assume the rule of the Humeerpore district, collecting revenue, and forbidding, under pain of death, payment of revenue to the British, which was being collected for them by the Rajah of Chirkaree. The chiefs of Kirwee were two brothers (2) called Narain Rao and Madho Rao, connexions of Nana Sahib, both young men, and much under the influence of their prime minister, one Radho Gobind. They also, like the Nawab of Banda, were at first friendly to the British, but towards the end of the year 1857 they conspired with him, advanced him money, shared the revenue which he unlawfully exacted, and took mutineers into their pay.

The most faithful ally in Bundelcund to the British was the

(1) Carthew's Appendix, 52. (2) Ib. 53.

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Rajah of Chirkaree. In July, 1857, he had been invested by Mr. Carne (the assistant magistrate on duty at Chirkaree) with the management (1) of the Humeerpore district, and deputed to collect the revenue for the British government. He was not, however, strong enough for this task, and became the object of attack by the enemies of the British, especially the Nawab of Banda and Nana Sahib. (2) Towards the end of January, 1858 (3), he was defeated at Belgaum by mutineers from Julalpore, and compelled to retreat to his capital, Chirkaree, where he expected daily to be attacked. Mr. Carne, through Major Ellis, applied for assistance for him from Sir H. Rose's column; but Sir R. Hamilton found himself obliged to decline, and could only suggest the possibility of General Whitlock being able to help him. (4) The Rajah of Chirkaree's fears proved true. His city was attacked. On the 18th of February about 1200 mutineer infantry and cavalry from Kalpee, with ten or eleven guns, aided by 8000 or 9000 matchlockmen and sowars, came down upon Chirkaree and invested it. These assailants were undoubtedly the Gwalior Contingent, which had mutinied against the British, and were now in the Nana's pay and headed by his agent Tantia Topee. (5) They were shortly afterwards reinforced by troops from the Nawab of Banda and the Ranee of Jeitpore. (5) No assistance came from Major Ellis (6), or Major Erskine, or Sir R. Hamilton, and the besiegers obtained possession of the whole of the city of Chirkaree, the fort only holding out. In this emergency Mr. Carne, on the 27th February (7), and again on the 1st of March (7), wrote for assistance direct to Mr. Edmonstone, the secretary to the governor-general at Allahabad; but the governor-general, through his secretary, in a letter of the 7th of March, informed Mr. Carne that he (8) could not interfere with the movements of Sir H. Rose, but that nevertheless he would send on his correspondence (9) with Mr. Carne to Sir R. Hamilton, and this he accordingly did; and in reply, on the 13th of March, 1858, Sir R. Hamilton enters in

(1) Carthew's Appendix, 30, 39, 42, 44.
(2) Carthew's Appendix, 48.
(3) IV.—38, 42, 43.
(4) IV.—42.
(5) VI.—188.
(6) IV.—58, 59, 61, 69, 70.
(7) IV.—72, 77.
(8) IV.—96.
(9) IV.—97.

detail into the obstacles which will prevent Sir H. Rose from giving assistance to Chirkaree. This letter is important, as shewing what were Sir Hugh Rose's plans at that time.

IV.—102.

No. 108 of 1858.

From Sir ROBERT HAMILTON, Bart., Agent to the Governor-General for Central India, to G. F. EDMONSTONE, Esq., Secretary to the Government of India, with the Governor-General.

Indore Residency, Camp Muthra, 13th March, 1858.

SIR,

I have the honour to acknowledge the receipt last night of your dispatch, No. 249, dated 7th current, regarding the critical position of the Rajah of Chirkaree, with a copy of your dispatch to Mr. Carne, assistant magistrate on duty at Chirkaree.

2. The 2nd brigade of Major-General Sir Hugh Rose's force is within ten miles of Tal Behat and thirty-five from Jhansi, whilst the 1st is before Chundairee. Chirkaree is, by the nearest route, twelve marches from this, the nearest division, but the entire country intervening is occupied by the rebels, who have possession of Burwa, Saugor, Raneepore, Mhow, Keetah, Raat, Punwarree, Jeitpore and Aliporra; they are threatening the fort of Oorcha, and have within the last two days burnt five Tehree villages in its neighbourhood.

3. To relieve Chirkaree by this force would involve refusing Jhansi and the suspension of the plan of operations towards Kalpee, both of which operations form the groundwork of his instructions, and also a series of engagements with the rebels, through whose positions a way must be cut; though on this account Sir Hugh Rose does not apprehend any difficulty would have been experienced in relieving Chirkaree, still to do so would have been to sacrifice two certain operations to a most uncertain one, besides sacrificing the season which his excellency the commander-in-chief considers should close operations. However anxious, therefore, the desire to aid the Rajah of Chirkaree, Major-General Sir Hugh Rose is compelled to consider the movement of his force, or of any part of it, in the direction of Chirkaree, at present impossible.

4. It was apprehension for Chirkaree that made me suggest the advance of General Whitlock's column on Banda. Could this have been ordered, not only would Chirkaree in all probability have been saved, but that quarter of Bundelcund relieved from the pressure of the rebel forces, now aggregating from 30,000 to 40,000 men, with artillery and cavalry.

5. Sir Hugh Rose does consider that the advance to Banda would have been very desirable, if it had been combined with the protection of Saugor.

7. The advance of this force on Jhansi, in the opinion of Major-General Sir Hugh Rose, is calculated to draw the rebels to assist in its defence; whilst the fall of that fortress and its possession by us will break up the confederacy, take away its rallying-point, and destroy the power and influence of the ranee, whose name is prominently used to incite rebellion and maintain opposition to the British authorities.

I have, &c.

(Signed) R. N. C. HAMILTON,

Agent to the Governor-General for Central India.

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Major-General Sir Hugh Rose has perused the letter, and authorizes me to say he entirely concurs.

(Signed) R. N. C. HAMILTON,
Agent to the Governor-General.

But within a few days the government of India came to a different opinion from that which they had held on the 7th of March (1), when they had written to Mr. Carne informing him that he could not expect assistance at Chirkaree; for on the 13th the governor-general, through his military secretary, sent to General Whitlock the instructions already alluded to, ordering him forthwith to proceed to the relief of the loyal chiefs of Bundelcund. The instructions were to the following effect:

II.—226.

To Major-General WHITLOCK, Commanding Moveable Column, Camp Dumoh.

Military Department, Allahabad, 13th March, 1858.

SIR,

From intelligence which has reached the right honourable the governor-general from Chirkaree, it cannot be doubted that the fort of that place has, by this time, fallen into the hands of the insurgents, who were laying siege to it, and who were already masters of the town, part of which was burnt.

Punnah also and Rewah are threatened.

It is of urgent importance that support should be given to the loyal chiefs of Bundelcund as soon as possible; and as no troops can be moved into the Bundelcund states from this side of the Jumna, the governor-general directs me to request that you will proceed at once, with the column under your command, in the direction of Punnah, Chirkaree, or such other point as you may judge expedient, with the object of supporting the chiefs who may be threatened by the insurgents, and freeing them from the danger to which they are now exposed.

You will use your discretion as to leaving a garrison at Dumoh, or elsewhere, in the Saugor territory; but you are requested to bear in mind that the governor-general wishes the relief of the well-affected Bundelcund chiefs to be considered as the paramount object for the present.

It is necessary that you should communicate your movements to Major-General Sir H. Rose, in order that he may be able to shape his own course, so as to combine with yours in giving confidence and support to the chiefs.

Sir H. Rose will receive instructions to this effect.

I have, &c.

(Signed) R. J. H. BIRCH, Colonel,
Secretary to the Government of India,
Military Department, with the Governor-General.

These instructions reached General Whitlock on the 16th March, while still near Dumoh. (2) He at once returns to Dumoh (3),

(1) IV.—96. (2) III.—222. (3) II.—229.

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and puts himself on the high road to Punnah, which lies to the N.E. Major Erskine, Commissioner of the Saugor and Nerbudda territories (1), leaves him, as it would be no use to accompany him beyond the boundaries of his division, and is shortly afterwards replaced (2) by Major Ellis, the political assistant of Bundelcund, and the subordinate of Sir R. Hamilton. General Whitlock at once communicates with Sir H. Rose, as follows:

(No. 55.) II.—229.

From Major-General WHITLOCK to Major-General Sir HUGH ROSE, K.C.B., commanding Central India Field Force, Head Quarters, Camp beyond Jhansi, Assistant Quartermaster-General's Office; dated Camp at Dumoh, 19 March, 1858.

SIR,

I have the honour to enclose for your information the accompanying copy of a letter received from the Secretary to Government of India, Military Department, with the governor-general.

2. In consequence of these instructions I returned to Dumoh, and placed myself on the high road to Punnah, on which place I shall move the moment my details of artillery, cavalry, and infantry join me from detached duty, which I hope will be on the morrow.

3. I have communicated with Major Ellis, and of course must be guided in my future operations by such information as I receive from that officer.

4. In the meantime you shall be kept regularly acquainted with my movements, and I beg the favour of hearing what arrangements you propose making to carry out the wishes of the governor-general, that our plans may be combined.

I have, &c.

(Signed) G. C. WHITLOCK, Major-General,
Commanding Saugor Field Division.

Another copy of these instructions of the 13th March, directing General Whitlock to march to the relief of the Bundelcund chiefs, was forwarded by Colonel Birch to Sir H. Rose, who received them on the 19th March, whilst at Sirrhus Ghat, about two marches from Jhansi. These instructions to General Whitlock were not at first construed by Sir H. Rose as rendering it incumbent upon himself to postpone his attack on Jhansi; on the contrary, he conceived he would be satisfying the views of the governor-general if he proceeded at once to Jhansi and took it, and then, instead of advancing north to Kalpee, he should turn to the eastward, and in combination with General Whitlock, effect the relief of the Bundelcund chiefs. Accordingly he thus writes to that officer and to Colonel Birch:

(1) II.—238. (2) II.—229.

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II.—230.

From Major-General Sir H. ROSE, K.C.B., commanding Central India Field Force, to Major-General WHITLOCK, commanding Saugor Field Division; dated Sirrhus Ghat, two marches from Jhansi, 19th March, 1858.

SIR,—I have the honour to state to you that I received this day the copy of a letter, dated 13th instant, from Colonel Birch, secretary to government of India, Military Department, and with reference to it to say, that I shall be most happy to combine my future movements with yours in giving confidence and support to the Chirkaree and other loyal Bundelcund chiefs, and, as the best means of doing so, to attack, in combination with your force, the numerous rebels who are besieging him at Chirkaree, and who are concentrating at Nowgong.

I should feel extremely obliged to you if you would have the goodness to acquaint me with your future movements.

I march from here to-morrow, intending to arrive before Jhansi on the 20th instant, when I shall commence its attack without any delay. Sir R. Hamilton tells me that its garrison consists of 1500 Sepoys and 1000 Bundelas. Immediately after its capture I shall proceed with my two brigades to carry out, in combination with yourself, the operations pointed out by the governor-general, crossing the river Betwa.

The greatest concentration of rebels appears to be at Nowgong and Chirkaree; the former have assumed the title of the Army of the Peishwa.

Brigadier Stuart, commanding my first brigade, reports to me that on the 17th instant he stormed the fort of Chundairee at 5 A.M. that day; there were about fifty dead bodies found about the fort, but the jungly and mountainous nature of the country enabled the garrison to escape.

Brigadier Stuart will join me before Jhansi immediately.

I have, &c.

(Signed) H. ROSE, Major-General,
Commanding Central India Field Force.

II.—228.

From Major-General Sir HUGH ROSE, K.C.B., commanding Central India Field Force, to Colonel BIRCH, Secretary to the Government of India, Military Department; dated Camp Sirrhus, on the left bank of the River Betwa, 19th March, 1858.

SIR,—I have the honour to acknowledge the receipt this day, for my information and guidance, of a copy of your letter of the 13th instant, to Major-General Whitlock, containing the right honourable the governor-general's instructions to that officer respecting his advance, with the column under his command, in the direction of Punnah, Chirkaree, or such other points as he may judge expedient, for the purpose of supporting the well-affected chiefs who may be threatened by the insurgents, and freeing them from the danger to which they are now exposed. I have the honour to say that I shall pay the strictest attention to these instructions, and be careful to shape my own course so as to give, in combination with Major-General Whitlock, confidence and support to these chiefs.

I may, I hope, be permitted to say that I have received with sincere pleasure these instructions. Strategically and politically speaking, they are calculated to produce the best effect in this part of India; and they develop and complete a plan of operations which Sir Robert Hamilton and myself had agreed yesterday

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that it would be advantageous to carry out after the reduction of Jhansi, for the relief of the chiefs in question, and the defeat of the rebel army concentrated at Chirkaree and Nowgong, whose numbers, Sir Robert Hamilton says, amount to 60,000 men, according to the last reports received. Both Sir Robert Hamilton and myself had always felt the strongest wish to assist the Chirkaree chiefs who had supported the English government with so much devotion. But the reports from Mr. Carne, which represented his position at Chirkaree as quite desperate on the 1st of March, when my force could not possibly have reached that place till three weeks or a month later, precluded all hope of relieving him.

The plan I have mentioned—that is, a march against the rebels at Chirkaree, or in that direction—has, under existing circumstances, advantages over a direct march to Kalpee from Jhansi. If I marched straight to Kalpee, I leave sincere and influential supporters of the British government—the Rajah of Chirkaree, the Ranee of Bigaroo and Tehree, and others—to be overrun by masses of rebels; and I should have the so-called Army of the Peishwa on my right flank, and closing in, as I advanced, on my rear. It is evident that it is more advantageous to attack the Peishwa's army separately, and Kalpee separately, than to place myself between their two fires. The round I should have to make to relieve Chirkaree would not delay me much as to my arrival at Kalpee, and the defeat of the rebels will leave friends instead of enemies in my rear.

The arrival of Major-General Whitlock on my right flank, and his co-operation with me, is a most important improvement on the plan just mentioned; and I may add that nothing will tend more to cause effectually the permanent pacification of the Saugor district than an advance of Major-General Whitlock's force in the direction pointed out by the governor-general.

I have, &c.,

(Signed) H. ROSE, Major-General.

But on the next day, the 20th of March, Sir R. Hamilton received instructions from Mr. Edmonstone which required Sir H. Rose to postpone his operations against Jhansi. Only extracts from these instructions are put in evidence.

I.—69.

SECRETARY TO THE GOVERNMENT OF INDIA, Foreign Department, to Sir R. HAMILTON, Agent for Governor-General, with Sir HUGH ROSE'S Force, dated 13th March, 1858.

* * * * *

"To-day it is announced that Major-General Whitlock has reached Dumoh, and instructions have been sent to him to march upon Punnah, Chirkaree, or such other point as may be threatened by the insurgents, leaving a garrison at Dumoh, if he should consider that necessary."

5th. "Major-General Whitlock is requested to communicate his movements to Sir Hugh Rose, in order that the two forces may, if necessary, act in concert, for the purpose of freeing the loyal rajahs at Chirkaree, Punnah, and Rewah, from the danger which now threatens them."

6th. "It is the governor-general's wish that this object should, for the present, be considered paramount to the operation against Jhansi, and that Major-General Sir Hugh Rose should take such steps as may most effectually contribute to its accomplishment."

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Notwithstanding these instructions, Sir R. Hamilton and Sir Hugh Rose resolve to persevere in their march upon Jhansi; and on the same day, 20th of March, Sir R. Hamilton writes to Mr. Edmonstone a letter (1), the object of which was to shew that General Whitlock would effect the relief of the loyal chiefs before ever Sir H. Rose could arrive at the spot, that it would be inexpedient to suspend operations against Jhansi, and that such operations would indirectly secure the object of the governor-general, viz. the relief of the loyal chiefs of Bundelcund; the attack on Jhansi would probably draw off Tantia Topee from Chirkaree, whilst its fall would cause the mutineers infesting Bundelcund to lose heart. The letter also holds out the expectation that upon the arrival of Brigadier Stuart's brigade from Chundairee, Sir Hugh Rose may be able to organise a flying column, which should move rapidly towards Bigowar, Chutterpore, and elsewhere, to succour the loyal states between Tehree and Punnah. This letter seems to have been entirely satisfactory to the supreme government, for on the 30th of March (2) Mr. Edmonstone communicates to Sir R. Hamilton Lord Canning's approval of Sir H. Rose's determination to proceed with the attack on Jhansi.

Summing up, then, the result of this order of the 13th of March for the relief of Bundelcund: It did not affect immediately the movements of Sir Hugh Rose, who adhered to his original course of marching northwards on Jhansi; but it changed General Whitlock's plans altogether; he at once quitted the Saugor and Nerbudda territory, and entered Bundelcund, marching in the first instance in a north-easterly direction to Punnah. At the same time it was contemplated, that after the capture of Jhansi, Sir H. Rose might turn to the right, to carry on in combination with General Whitlock the operations in Chirkaree, &c., or might send a flying column to clear the country between Tehree and Punnah.

March 19—April 5. Battle of Betwa. Fall of Jhansi.

General Whitlock's force seems not to have started from Dumoh on route for Punnah till the 22nd (3) March; on the 25th it reached the right bank (4) of the Kane river; and on the 29th (5) of March arrived at Punnah, and halted there till the 2nd of

(1) IV.—106. (2) II.—234. (3) Plt.'s Supplements, 30.
(4) II.—237. (5) VI.—190.

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April. (1) The immediate necessity for General Whitlock to go to Chirkaree had ceased, for Major Ellis (who was with him) had heard (2) that on the 19th, ten days before the arrival of the Madras column at Punnah, the rebels besieging Chirkaree had retired, had left the rajah wholly unmolested, and had collected in force near Nowgong. Nevertheless, General Whitlock seems to have determined to go to Chirkaree, adopting for his route, one of those, apparently, which Sir R. Hamilton in his letter (3) to Mr. Edmonstone had mentioned he might take, namely, the route which would lead him in a north-westerly direction through Punnah Ghaut, across the Kane river to Mandala, and thence to Chutterpore, from which place he was expected to reach Chirkaree on the 8th. (4) As to where he intended to go after Chirkaree, there is a paucity of evidence, which is much to be regretted. In the governor-general's diary (5) it is stated that "General Whitlock was expected at Punnah on the 29th March, when he would move against the rebels who left Chirkaree upon the 19th idem, and have collected in force near Nowgong." There is no direct evidence that General Whitlock had received instructions or actually intended to go to Banda. But, on the other hand, Banda was only four marches (6) from Chirkaree; the Nawab of Banda had shewn himself one of the bitterest enemies (7) to the Rajah of Chirkaree and the other loyal chiefs of Bundelcund; the necessity for clearing out Banda had long been felt by the military authorities; at one time there had been an idea that Sir Hugh Rose (8) should go there, if he was unopposed at Jhansi, or found it too strong to be attacked; and that General Whitlock should go there had been contemplated as possible or advisable by several of the authorities, Lord Clyde (9), Sir Robert Hamilton (10) and Sir Hugh Rose (11), and this before the receipt of the orders of the 13th March for him to go into Bundelcund. And the reason of Sir R. Hamilton's recommendation to the above effect is expressly (12) stated to have been apprehension for Chirkaree. It

General Whitlock marches from Dumoh via Punnah to Mandala.

(1) Plt.'s Supplements, 31.
(2) IV.—154.
(3) IV.—106.
(4) II.—240.
(5) V.—107.
(6) II.—240.
(7) Carthew's Appendix, 52.
(8) Green Book 9 II. 224, 225.
(9) Green Book 7.
(10) IV.—102.
(11) II. 218, IV 102.
(12) IV.—102.

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should also be mentioned that at the time of the arrival at Punnah of General Whitlock and Major Ellis, the political officer attached to the Madras column, the attention of Major Ellis (1) seems to have been directly called to the state of Banda and also of Kirwee. For the above reasons, it seems extremely probable that after Chirkaree General Whitlock would proceed to Banda.

On the 2nd of April (2) General Whitlock's force descended a very difficult pass, Murwa Ghaut, to a place called Mandala, close to the river Kane. There they were obliged to halt, in consequence of the baggage having been delayed; and whilst halting, on the 3rd (3) of April an express came in from Sir Hugh Rose, dated the 30th March, directing the force to move forward with all expedition direct on Jhansi. General Whitlock at once made every exertion (3) to comply with this request, but from the first it was foreseen that it would be hardly possible for the force to move on again until the 5th.

In the result, before they could leave Mandala, there came further news (4) that the rebels had been completely defeated by Sir H. Rose before Jhansi, and were in full flight. This defeat was the great battle of the Betwa. In fact, the predictions of Sir R. Hamilton in his letters to Mr. Edmonstone of the 13th and 20th March (5) had been verified; the advance on Jhansi had drawn the rebels to its defence. The rebels who were besieging Chirkaree had left it upon the 19th, had marched across the country to Nowgong, and thence advanced to attack Sir H. Rose under the walls of Jhansi, where he had been joined by his first brigade under General Stuart. The rebel force styled itself the Army of the Peishwa, and is stated to have consisted of (6) 27 guns, 2000 mutineers (about one-third being of the Gwalior Contingent), 6000 or 7000 Boondelas and Velaites, and a large body of cavalry. The army was led by Tantia Topee, the rajahs of Banpore and Shahghur, and other chiefs. It was the news of the approach of this formidable host that had induced Sir H. Rose to send to General Whitlock for assistance. The enemy crossed the Betwa on the 31st of March, and on the 1st of April

(1) VI.—190.
(2) Plt.'s Supplements, 31.
(3) VI.—199.
(4) VI.—206.
(5) IV.—102, 106.
(6) IV.—114.

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attacked Sir H. Rose. A general action (1) ensued, in which the enemy were totally routed, and were driven back across the Betwa in precipitate flight, some towards Mhow Rannypore, the great mass towards Kalpee. Two days afterwards Sir H. Rose carried the town of Jhansi by assault after a determined resistance, and on the 5th April occupied the fort, the ranee having effected her escape by night. The total loss of the enemy at the Betwa and in Jhansi was estimated at 3000, that of Sir H. Rose's force at 230. (2) That these successes of the British arms greatly depressed the rebel cause is unquestionable: Sir R. Hamilton, in announcing to Mr. Edmonstone the battle of the Betwa (3) says:

> So complete a defeat must have an important effect on the whole of Bundelcund, and will, I trust, relieve the loyal petty states, who have been hardly pressed by these ruthless, merciless rebels.

And Captain Pinkney, the superintendent of Jhansi, writes (2) to Mr. Muir, the secretary to the governor of the north-western provinces:

> The example made at Jhansi will, I have no doubt, have an excellent effect in tranquillizing Bundelcund.

April 5—19. Sir H. Rose at Jhansi. General Whitlock takes Banda. Effect of the battle of the Betwa and the fall of Jhansi upon the movements of the two columns.

After the fall of Jhansi on the 5th of April, Sir H. Rose resolved to advance to Kalpee. This was a perseverance by him in his original plan, and renunciation of the project (4) which he had adopted after the order of the 13th March of crossing the Betwa, and of carrying on operations in combination with General Whitlock in relief of the loyal chiefs of Bundelcund; but events had changed in the meantime, and in advancing to Kalpee he would be pursuing the enemies of those loyal chiefs, for, as has been stated, the army which had besieged Chirkaree was the same army which had fought at the battle of the Betwa, and had now retreated to Kalpee. At all events, Sir H. Rose's resolution to march to Kalpee was subsequently approved by Lord Clyde. (5) But this resolution proceeded from no intention to be quit of the Madras column. On the contrary, Sir H. Rose was desirous that both forces should be combined under his own command. On the

(1) IV.—110, 112, 114. (2) IV.—114. (3) IV.—110.
(4) II.—228. IV. 106. (5) I.—70. Eyre's Proofs, 26.

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6th April (the day after the occupation of Jhansi) he thus (1) writes to Lord Clyde:

I shall be much obliged to your Excellency if you will allow me to command the troops in Central India. General Whitlock is very good-natured, and we get on famously together, but I am sure you will agree with me that, to ensure a combined operation, the command should be in one hand.

Lord Clyde's answer to this communication is not given; but it is clear that he did not assent to Sir Hugh Rose's proposal. Sir R. Hamilton's plan was that General Whitlock should act on Banda at once, and having dislodged the rebels then advance by Jullalpore or Humeerpore on Kalpee, so as to co-operate with Sir H. Rose's force at that place; for on the same date as Sir Hugh Rose's letter to Lord Clyde, the 6th of April, he writes the following memorandum (no doubt for the use of Sir Hugh Rose, though the fact is not stated):

II.—240.

MEMORANDUM.

6th April, 1858.

General Whitlock will be at Chirkaree on the 8th, and his future movements will depend on what he may learn from us.

Chirkaree is four marches from Banda (2), and, as the rebels have been cleared from Mhow Rannypore, I think General Whitlock should act on Banda at once, and, having dislodged the rebels there, advance by Jullalpore or Humeerpore on Kalpee, so as to co-operate with this force on that place.

It is necessary that General Whitlock should have some expression of our views by to-day's dispatch.

(Signed) R. HAMILTON,
Agent to Governor-General.

And on the 9th April Sir R. Hamilton writes to Sir H. Rose:

II.—239.

From Sir R. HAMILTON to Sir HUGH ROSE; dated 9th April, 1858.

MY DEAR SIR HUGH,—I suppose General Whitlock will move on Banda, as you have cleared off all in this quarter.

Yours, &c.
(Signed) R. HAMILTON.

The rebels at Mhow Rannypore, of whom Sir Robert Hamilton thus speaks as having been cleared away, were part of the Army of the Peishwah who, after the battle of the Betwa, had fled thither, whilst the others went to Kalpee.

(1) Supplementary, S.
(2) Mahoba 10 miles, Kulra 9, Mutwun 9, Banda 10.

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Turning now to General Whitlock, he had received the news of the battle of the Betwa whilst he was at Mandala, on the 4th or 5th April, and just as he was about to turn off to Jhansi in accordance with the request of Sir Hugh Rose for assistance; the news of course stopped him, for the defeat and flight of the rebels rendered such assistance no longer necessary. Instead of going to Jhansi, he went to Banda. It is probable that he himself had determined upon this movement before he received Sir R. Hamilton's dispatch of the 6th, if a dispatch was, as seems likely, actually written to him on that day. For at Mandala, judging by the time (1) which the express of April 30, directing him to march to Jhansi, had taken on its way, he was at a distance of three or four days' journey from Jhansi, and by the 12th (2) Sir R. Hamilton had received his dispatch "intimating his intention" (2) to proceed by Chirkaree to Banda. As early as the 7th General Whitlock (3) had set his force again in motion from Mandala; on the 9th they reached Chutterpore; and on the next day they had what seems to have been their first engagement with the enemy at a place called Jheeghun. (4) They made a night march, and surprised the rebels whilst evacuating the fort. The rebels were led by Disput Bandala, who had long been the terror of the district, and who it seems had just returned from Jhansi; he had, therefore, been fighting against Sir Hugh Rose. On the 10th Sir Hugh Rose wrote (5) to General Whitlock, telling him that Mhow Rannypore was again occupied by rebels under the ex-rajahs of Banpore and Shahghur, and asking for supplies of shot and shell. The circumstances, then, under which Sir Robert Hamilton had counselled the advance of General Whitlock on Banda had changed. Mhow Rannypore, instead of being clear of rebels, was again occupied by a large force of the enemy. Nevertheless, it does not seem to have occurred to Sir Robert Hamilton that this reverse of circumstances rendered it advisable for General Whitlock to postpone his advance on Banda. Quite the contrary. A part of Sir Hugh Rose's force was despatched under Major Orr to disperse these rebels at Mhow; and on the 12th of April Sir Robert Hamilton, having been informed (correctly or otherwise) that General Whitlock had altered

(1) VI.—199. (2) II.—240. (3) Plt.'s Supplements, 31.
(4) VI.—204. Gazette 19. (5) Supplementary, V.

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his route, so as to be able to act on the rebels should they retreat to Chutterpore or Nowgong, wrote to inform him of the intended disposition of Major Orr's troops, and to urge him to prosecute his intention of attacking Banda, after which he might clear the right bank of the Jumna between Banda and Kalpee, and his force would be in a position to act in co-operation with Sir Hugh Rose at Kalpee.

I.—70.

From Sir R. HAMILTON, Bart., Agent Governor-General for Central India, to Major-General WHITLOCK, Commanding Nerbudda Field Force; dated Camp, Jhansi, 12th of April, 1858.

SIR,

I have had the honour to receive your dispatch, intimating your intention to march by Chirkaree to Banda, and I have learnt that, consequent on intelligence from Jhansi, you had altered your route so as to be able to act on the rebels should they retreat towards Chutterpore or Nowgong. The complete rout suffered by the rebel forces which had combined to relieve Jhansi on the 1st of this month, and the subsequent capture of the town of Jhansi and possession of the fort, have driven the remnants of the mutinous sepoys with the ex-chief of Banpore, Shahghur, and Myhere towards Kalpee, in which direction Tantia Topee and the Ranee of Jhansi have also fled.

2. The mutineers have fled towards and are collecting at Kalpee, and on that place it is the intention of Major-General Sir Hugh Rose to move immediately.

3. To-morrow (13th) a column (1) will move by Burwa Saugor to Mhow Rannypore, where they will arrive on the 16th or 17th; from thence this column will move by Tou Futteypore, to Goossuari, and so to Orai, rejoining there Major-General Sir Hugh Rose's force on the main road from Jhansi to Kalpee.

4. Sir Hugh Rose, with the remainder of the force, after providing for the protection of Jhansi (where the sick and wounded will be left), purposes moving on Orai, thence proceeding to Kalpee, before which place the general hopes to arrive about the 26th. It is desirable that you should with your force prosecute your intention of attacking Banda, at which place it is likely the rebels may make a stand, and after dispersing them, if you could move on Jullalpore by Humeerpore or any other route, your operations would sweep and clear the right bank of the Jumna, between Banda and Kalpee, and your force would be in a position to act in co-operation with Sir Hugh Rose at Kalpee.

This communication of Sir R. Hamilton subsequently received the approval of the governor-general. (2)

Major Orr seems to have followed (3) the route prescribed to him, and to have had an action with the enemy at a place called Kotra, an important ford of the Betwa; he did not succeed, however, in cutting off the rebel rajahs, who effected their escape to

(1) Major Orr's Field Force of the Hyderabad Contingent.
(2) I.—71. (3) Gazette, 20.

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the south; he himself rejoined Sir Hugh Rose before Koonch. Whether or not Major Orr communicated with General Whitlock there is no evidence before the Court to shew. But communication may have taken place about the 16th of April, when Major Orr was expected to be at Mhow Rannypore and General Whitlock's force was at Mahoba, which is between Jheighun and Banda. From Mahoba General Whitlock advanced to Banda. At his approach on the 19th April, the nawab and his forces came out to meet him, and a general action (1) took place. The result was that the nawab, after considerable fighting, was defeated, leaving on the field, it was estimated, more than 1000 of his men, 800 of whom were amongst the killed. The British loss was seven, and besides, four officers were wounded, one mortally. The nawab himself fled, it was believed in the first instance to Kirwee, but subsequently he made for Kalpee with a large force amounting to 2000 men and upwards. The British troops took possession of Banda, and in the palace they found part of the booty which is now to be disposed of. General Whitlock telegraphed his success to Lord Clyde (2), and also to the commander-in-chief of the Madras army (3), and on the next day forwarded to Sir H. Rose a copy of the telegram to Lord Clyde, together with a letter. (4) On the day of the battle of Banda, the 19th April, Sir H. Rose and his force were still at Jhansi, 160 miles off, preparing to march to Kalpee.

April 5 to May 23. Sir H. Rose advances from Jhansi; takes Kalpee. April 19 to May 23. General Whitlock at Banda.

On the 5th April Sir Hugh Rose had become completely master of the fort and town of Jhansi. His next point was Kalpee, to which the rebels were from all sides collecting, but advance was impracticable, unless his flanks and rear were adequately protected, and both were threatened. On the right the ex-rajahs of Banpore and Shahghur, after their defeat on the Betwa, had rallied their forces near Mhow Rannypore, and it was to disperse them that, as before stated, Sir H. Rose sent on Major Orr from Jhansi with the Hyderabad Contingent. (5) His left and rear were still more important, and were still more seriously endangered; for on his left ran the Great Trunk Road from Bombay to Agra, passing through Goonah, Kolarus, Sepree,

(1) VI.—207. Gazette 4—10. (2) II.—245. (3) I.—177.
(4) II.—245. (5) I.—70. V.—36. Gazette, 20.

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and Gwalior. The clearance of this road had been assigned to the Central India Field Force as their primary duty, and had been effected by the first brigade under General Stuart, whilst Sir H. Rose himself with the other brigade had marched to relieve Saugor. But at this time, April 10, within two miles of the road itself (1), between Kolarus and Goonah, there were collected a body of rebels, chiefly fugitives from Kotah, which had been stormed by General Roberts on the 30th March, also fugitives from Chundairee (2) (taken by General Stuart), and fugitives from Jhansi (3), altogether a formidable force, some 2000 (3) in number. Without some protection against these rebels it was imprudent for Sir H. Rose to leave Jhansi; yet, with his small force, he could not afford to leave behind a guard for his rear. There were no other friendly troops in the neighbourhood, except Major Mayne's irregular horse at Kolarus (4) and some troops of Maharajah Scindiah, left as a garrison at Chundairee. Under these circumstances Sir H. Rose was anxious that these Kotah rebels should be followed up by a detachment from the Rajpootanah Field Force under General Roberts, and to this end he and Sir R. Hamilton made sundry applications to the governor-general (5), to his agent in Rajpootanah (Brigadier-General Lawrence), to General Roberts, and to the civil and military authorities in Bombay. It was not till the 20th April (6) (one day after the battle of Banda) that the governor-general sent orders to General Roberts to place a force at Sir H. Rose's disposal. On the 23rd April General Roberts accordingly despatched a column under Brigadier Smith to march towards Goonah, and on its approach Sir Hugh Rose directed it to Seepree (7) on the Grand Trunk Road; and himself, without any further delay, on the 25th (8), started with his own force for Kalpee, leaving behind a garrison for Jhansi.

It appears that Sir Hugh Rose, before he became aware of this order having been given by the governor-general for a detachment from General Roberts' force, had telegraphed to the com-

(1) IV.—121.
(2) Gazette, 22.
(3) IV.—127.
(4) IV.—119.
(5) IV.—120, 126, 127. III.—225.
(6) IV.—128.
(7) Roberts' Proofs, 11 G.
(8) Gazette, 20.

mander-in-chief of Bombay, applying for assistance from General Roberts, and also, as it would seem (1), from General Whitlock. For thereupon the Bombay authorities proceeded on the 5th of May to communicate (2) with the Madras authorities urging that such a detachment from General Whitlock's force should be made; and, without waiting for an answer, they sent to General Whitlock a copy of their communication (3), with "a request that he would comply with Sir H. Rose's requisition, so far as might be consistent with the orders under which he was himself acting." The answer from Madras, which arrived by telegraph on the same day, the 5th of May, was in these words (4):

"General Whitlock is in communication with General Rose. He is acting under orders for governor-general.

This was exactly the case. It appears from a dispatch (5) from the chief of the staff to Colonel Birch, dated the 25th of April, that General Whitlock was then at Banda, and was waiting till the governor-general should indicate to Lord Clyde what directions should be given to him. It appears also that Sir Hugh Rose had applied directly to General Whitlock to co-operate with him in his advance upon Kalpee. General Whitlock had thereupon written to the governor-general, asking for reinforcements from the north of the Jumna for his own column, in order that he might respond to the call of Sir H. Rose. The governor-general, on the same day (6) that he received the application, the 28th April, had answered it to the effect (7) that he feared neither he nor Lord Clyde could spare men to reinforce General Whitlock, and unless they could, General Whitlock must remain at Banda, for the presence of a military force would be required there for some time.

The dispatch of the 28th April from the governor-general probably reached General Whitlock about the same time as he received the following most important instructions from the chief of the staff:

VI.—257.

No. 9.—B. W.

By Order of the Commander-in-Chief. Memorandum by the Chief of the Staff for the guidance of Major-General WHITLOCK, commanding Saugor Nerbudda Force.

(1) III.—225, 224. (2) III.—227, 228. (3) III.—228. (4) III.—229.
(5) Eyre's Proofs, 27. (6) Eyre's Proofs, 28.
(7) Supplementary, O.

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Head Quarters, within 6 miles of Jellalabad.
27th April, 1858.

Major-General Whitlock is informed that it is the opinion of the governor-general and the commander-in-chief that the native portion of his force should be cantoned at Banda till after the rains, while the European portion of it might proceed to Allahabad to occupy quarters.

Major-General Whitlock is begged to give an opinion as to whether this would be prudent with respect to the constitution of his force.

At the present moment Sir HughRose is advancing on Kalpee.

If the country in the vicinity of Banda and to the eastward is sufficiently pacified to admit of the absence of General Whitlock's force from where he now is for three weeks, he is directed to march up the right bank of the Jumna, to co-operate with Sir Hugh Rose, and then to retrace his steps immediately after the reduction of Kalpee.

However, before giving execution to this order, General Whitlock must well weigh the state of the country according to his information, as he alone is capable of estimating the prudence with regard to the aspect of affairs in his neighbourhood, and the general condition of the country to the eastward since his late successes.

He is requested to acknowledge the receipt of this by telegraph, viâ Futtehghur, addressed to the care of Brigadier Seaton, C.B., the commander-in-chief having proceeded into Rohilcund, and being, therefore, removed from the wire.

By order,
(Signed) W. R. MANSFIELD,
Major-General,
Chief of the Staff.

There is evidence that the enemy expected General Whitlock to go to Kalpee; for (1) it was in order to oppose him, that about this time, on the 30th April, the Rao Sahib, with 1000 men and the relics of the Banda nawab's force with three guns, collected at Jullalpore, which it is worth remarking was on one of the routes which Sir R. Hamilton had in the early part of the month suggested (2) General Whitlock might take. But two days before, on April 28, General Whitlock had sent off (3) a detachment under Brigadier Carpenter to escort the Rajah of Chirkaree to his capital, where the rajah's family were still in some danger, a measure which met with the entire approval of the governor-general. (4) And perhaps the sickness had already begun which in the middle of May was so fatal to General Whitlock's troops. (5) At all events, whatever the reason, General Whitlock remained at Banda.

(1) VI.—211. (2) II.—240. (3) IV.—139.
(4) IV.—148. (5) Supplementary, O.

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Meanwhile, on the 25th of April, as above-mentioned, Sir Hugh Rose had commenced his march on Kalpee. His first point was Koonch. (1) Here the enemy had determined to make a stand, and if possible to prevent his further advance. They had collected in numbers varying, according to different estimates, from 4000 to 10,000 with cavalry and several guns, had thrown up entrenchments and armed them. With the exception of some cavalry which had joined from Kotah, they were mostly old enemies, the same who had besieged Chirkaree, had fought at the battle of Betwa, or had escaped from Jhansi. They were led by the same leaders, Tantia Topee, the Rajahs of Banpore and Shahghur, the Ranee of Jhansi, and others. On the 7th May Sir H. Rose arrived before the walls. After some resistance the mutineers withdrew from the other side of the town towards Kalpee. Sir H. Rose stormed the town and pursued; the enemy effected their retreat in an orderly and soldier-like manner, but reached Kalpee in a greatly depressed condition. After the fall of Koonch, Sir Hugh Rose proceeded straight to Kalpee, and on the 15th May (2) encamped on the right bank of the Jumna, about four miles below the fort. Just before his arrival, the Nawab of Banda, whom General Whitlock had defeated on the 19th of April (2), threw himself into the town with about 3000 fighting men.

The importance of Kalpee, and the strength of its garrison, were thus described by Sir Hugh Rose in his dispatch to the chief of the staff of the 22nd of June, 1858.

Gazette, p. 49.

The rebels fought their best because they were defending Kalpee, their best fortified stronghold in Central and Western India, and only arsenal full of warlike stores and ammunition. Kalpee, on the right bank of the Jumna, in the hands of the rebels, prevented the concentration of the British armies of the west with those of the East of India; exposed to attack on the line of the Jumna, the army engaged in operations against the insurgents in the Doab, the line of the Ganges, Oude, and Rohilcund; and so long as Kalpee was rebel, so long the enemy had it in their power to say that the east and west of India might be British, but that the pivot of its centre was theirs. The enemy, physically speaking, was unusually strong; they were under three leaders of considerable influence—Rao Sahib (a nephew of Nana Sahib), the Nawab of Banda, and the Ranee of Jhansi. The high descent of the ranee, her unbounded liberality to her troops and retainers, and

(1) Gazette, 20—39. IV.—141, 143, 144, 146. VI.—211.
(2) IV.—153, 141.

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her fortitude, which no reverses could shake, rendered her an influential and dangerous adversary. The rebel army was composed of the Gwalior Contingent, the finest men, the best drilled and organised native troops of all arms in India; other mutinous Bengal infantry regiments, such as the 52nd; rebel cavalry from Kotah; and a chosen band of Valaitees; the whole reinforced by the force of all arms of the Nawab of Banda, comprising a great deal of mutinous Bengal cavalry, of which the 5th Irregulars, dressed in their red uniforms, formed a part. All the sepoy regiments kept up carefully their English equipment and organization; the words of command for drill, guard, rounds, &c., were given, as we could hear at night, in English.

To meet this powerful enemy Sir Hugh Rose was ill provided. Both his brigades were exhausted with their recent labours, and numbers of men were actually prostrated with sunstroke. The superintending surgeon of the field force thought it necessary to call Sir Hugh Rose's attention to the condition of the men as rendering a protracted siege impossible. Sir Hugh Rose communicated with Colonel Maxwell in the Doab, who had been instructed by Lord Clyde to assist from the left bank of the Jumna in the operations against Kalpee; and not only arranged that that officer should shell the town from the left bank of the Jumna, but he also drew a portion of Colonel Maxwell's troops across the river to the right bank; a step in direct contravention of Lord Clyde's orders. Even this reinforcement seemed insufficient for the work which had to be done, and Sir Hugh Rose was constrained again to apply for the aid of General Whitlock. For this purpose on the 19th of May both he and Sir Robert Hamilton telegraphed (1) to the governor-general, and in addition Sir Hugh Rose himself telegraphed to Lord Harris (2) at Madras, to beg him to give the necessary orders to General Whitlock. The answer from the Madras government was (3)—

> General Whitlock is serving under orders of government of India and commander-in-chief in India. He is not under the authority of Madras government.

The governor-general upon the receipt of Sir Hugh Rose's request forwarded (1) it to General Whitlock with instructions to this effect: General Whitlock was to support Sir Hugh Rose if he could spare any portion of his force; the governor-general trusted that it might be possible for him to do so; reinforcements would be sent to Banda, and would reach it by the 26th; at all events

(1) II.—243. (2) III.—242. (3) III.—247.

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General Whitlock was to communicate with Sir Hugh Rose, and inform him whether he could support him or no. And at the same time the governor-general wrote (1) to Sir Hugh Rose to inform him of the instructions given to General Whitlock. Upon the receipt of these instructions, General Whitlock wrote (2) to Sir Hugh Rose a letter, which was received on the 30th May (2), stating that he was expecting his second brigade under Brigadier McDuff immediately, and that he would then reinforce Sir H. Rose with a brigade efficient in all arms. This second brigade of General Whitlock's arrived at Banda on the (3) 27th May. Meantime, on the 23rd of May, Kalpee had fallen. The manner of its fall is fully described in Sir Hugh Rose's dispatch (4) to the chief of the staff on June 22. Suffice it here to say that it took place after a desperate battle at Goolowlee on the Jumna, and that the efforts of Colonel Maxwell's (5) force on both sides of the river greatly contributed to the successful result.

May 23—June 19. Sir Hugh Rose at Kalpee. Recovers Gwalior.

Kalpee had been the great stronghold and arsenal for the rebels, and with its fall on May 23 the campaign was thought to be at an end. Sir H. Rose wrote (6) to General Whitlock to say he no longer needed his assistance. Lord Clyde issued a general order (on the 28th May), congratulating the three columns under the commands of Generals Rose, Whitlock, and Roberts, upon the success of their labours. (7) Official arrangements were made on June 1st (8) by the chief of the staff for the distribution of the Central India Field Force as garrisons for the towns of Gwalior, Jhansi, and Kalpee. Suggestions were made both by Sir Hugh Rose (9) and by Sir R. Hamilton (10) that part of General Whitlock's force should be employed as a garrison for Humeerpore and Kalpee. Sir Hugh Rose resigned his command. No fears were entertained of the fugitives from Kalpee. Sir H. Rose wrote to Lord Clyde—"the sepoys are *completely* (11) down and dismayed." They were fleeing in the utmost disorder across the country in twos and threes, without guns or tents, throwing away their arms

(1) II.—243.
(2) VI.—258.
(3) III.—223.
(4) Gazette, 49.
(5) Gazette, 56.
(6) VI.—255.
(7) II.—282.
(8) III.—252.
(9) III.—245.
(10) III.—248. VI.—254.
(11) Supplementary Exhibit, B.

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and accoutrements, and even their clothes, to enable them to run faster. The first report to the contrary from Colonel Robertson, who was in command of the pursuing column, to the effect that the rebels were supposed to have taken the road westwards towards Gwalior, scarcely met with belief. Still (1) Brigadier Stuart was at once ordered off to reinforce Colonel Robertson. The next report quite reassured those at Jhansi, for it was to the effect that the rebels were in destitute condition near Gwalior, and imploring Scindiah's favour. Suddenly there came news which "created a sensation throughout India only equalled by that which was caused by the first mutinies." The rebels had rallied, and were once more an army of 5000 or 6000 strong. They were under their same leaders,—the Ranee of Jhansi, the Nawab of Banda, Rao Sahib, and the notorious Tantia Topee. They had, on the 1st June, attacked Scindiah, nine miles from his capital, his troops had treacherously gone over to the enemy, and he himself had escaped only as a fugitive to Agra. The rebels had entered his capital, had possessed themselves of the treasury and jewels, and were masters of the fort, one of the strongest in India. This is the description of Sir H. Rose, who adds (2):—"in short, the rebels who had fled in the most disorderly flight and helpless state from Kalpee, were now completely set up with abundance of money, a capital park of artillery, plenty of material, and Scindiah's army as their allies." They proclaimed the Nana under the title of the Peishwa (3), and called upon rebel rajahs of Shahghur, Banpore, Kotah, &c., to join them. No one could foresee the extent of the evil if Gwalior were not promptly recovered. The Supreme Government, in anticipation of disturbance throughout the valley of Nerbudda, thought it necessary to warn, not only the Bombay, but also the Madras authorities. (4) At Kalpee, not a moment was to be lost. Sir H. Rose resumed the command without waiting to communicate with Lord Clyde; and on the 6th June (5), a large part of his forces having apparently gone on, he himself started from Kalpee and followed Brigadier Stuart by forced marches on the road to Gwalior, and shortly afterwards he was reinforced by Brigadier Smith with a brigade of the Rajpootana Field Force.

(1) IV.—157. Gazette, 33. (2) III.—258. (3) III.—256, 257.
(4) Green Book, 40. (5) III.—243.

Sir H. Rose advanced with the utmost promptitude, and by the 19th of June the rebels had been defeated in a general action—the Ranee of Jhansi being (1) killed, and Tantia Topee and the Nawab of Banda escaping only by flight—Gwalior had been recovered, and the Maharajah Scindiah reinstated in his dominions. 1866 BANDA AND KIRWEE BOOTY.

To turn now to General Whitlock at Banda. In ignorance that Kalpee had fallen on the 23rd of May, he had written about the 26th (2) to Sir Hugh Rose that he expected his second brigade under Brigadier McDuff immediately, and that he would then reinforce Sir Hugh Rose with a brigade efficient in all arms. On the fall of Kalpee, Sir Hugh Rose wrote (2) to General Whitlock to inform him that he did not require his assistance. And in answer General Whitlock wrote on the 29th: May 22—June 6. General Whitlock takes Kirwee booty.

II.—246.

From Sir G. C. WHITLOCK to Sir H. ROSE; dated Camp Banda, 29th May, 1858.

MY DEAR SIR HUGH ROSE,

It was very kind of you, occupied as you must have been, not only to send me your telegram, but to favour me with a note from yourself.

Really your motto seems to be *veni, vidi, vici*, whilst my second brigade, with their snail pace, has prevented me from leaving this place. I offer you my sincerest congratulations on your great victory. I was to have marched this morning to join you, but now proceed to look after Narrain Rao, who has a large number of rebels and guns with him.

My small column has suffered very severely. My aide-de-camp and myself were prostated from the effects of *coup de soleil*, and I am only now recovering.

We have lost from sun-stroke five officers and several men.

It was frightful, the heat; now we are all better; the rain has cooled the air considerably.

I have just heard that some of the cavalry from Kalpee are making their way to Narrain Rao, but I disbelieve the fact.

I fancy the rebels look to the effect of the sun on our troops, but you have set them to rights on that point.

The 43rd are a good deal knocked up.

I trust you have not suffered from exposure.

Believe me, &c.

(Signed) G. C. WHITLOCK.

The 43rd Regiment, who are mentioned in this letter, are part of General Whitlock's second brigade, which had only arrived on the 27th, too late to be of service at Kalpee. Narrain Rao, whom General Whitlock announces he will now proceed to look after instead of going to Kalpee, is Prince of Kirwee.

(1) VI—246. (2) VI.—258.

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It appears that as early as the 22nd April (three days after the battle of Banda, which is not quite fifty miles from Kirwee) Narrain Rao had written (1) to Major Ellis, then with General Whitlock, stating he was not in rebellion, and was prepared, if allowed an opportunity, to prove his loyalty. In reply, Major Ellis wrote back on the 27th April (2), directing Narrain Rao to appear before him at Banda, bringing Madho Rao and Radho Gobind with him, and to come without guns, and attended by not more than 100 followers. In reply to this, on the 29th, Narrain Rao wrote back (1) saying that he was discharging all his new servants as fast as possible, but would come in at the end of a week or ten days. Shortly after receiving this last letter, Major Ellis received a letter from Sir Robert Hamilton, dated the 26th, containing a copy of dispatch, of April 17th (3), to himself (Sir Robert Hamilton) from the Supreme Government, ordering the immediate arrest of the princes of Kirwee and their prime minister Radho Gobind; and thereupon Major Ellis, thinking he might have erred in summoning Narrain Rao in a manner not altogether unfriendly, wrote (1) on the 2nd of May to Narrain Rao directing him not to come in till further orders and also wrote (1) to Sir R. Hamilton, sending him a copy of the correspondence with Narrain Rao, and asking for instructions regarding the trial of Narrain Rao in case he was allowed to come in. On the 12th of May, Sir Hamilton transmits (4) to Mr. Edmonstone a copy of Major Ellis's letter of the 2nd, and on the 24th May Mr. Edmonstone writes (5) back to convey the desire of the governor-general that neither Sir R. Hamilton nor Major Ellis should interfere further in the matter, but that the whole should be left in the hands of Mr. Mayne, the magistrate and collector at Banda. This, in fact, was a transfer from the political to the civil department, to which the matter might seem more properly to belong, as concerning a prince whose territory had been annexed and who was not independent. However, whether or not at Mr. Mayne's suggestion, General Whitlock determined to go to Kirwee, a distance of about forty-five miles from Banda. He set out on the 2nd of June. (3) On the morning of the 5th (4), when he was still some ten miles

(1) III.—233. (2) III.—234. (3) III.—226. (2) III.—246.
(4) Plt.'s Supplements, 31. (5)—III. Supplementary, O.

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off Kirwee, Narrain Rao and Madho Rao, the two princes came into the camp and surrendered themselves; Radho Gobind, their prime minister, having at the approach of General Whitlock's force, retreated to a fort called Manickpore, sixteen miles from Kirwee. On the next day (1), the 6th—the day Sir Hugh Rose set out from Kalpee to Gwalior (2)—General Whitlock entered Tirohan (Kirwee) without opposition, and took possession of the palace. In the palace yard he found numerous brass guns, and every description of munitions of war, including muskets and belts, and Sepoys' jackets of the 50th and 67th Regiments of the Bengal Infantry, and also of the Gwalior Contingent (3), which had fought at Chirkaree, Betwa, Koonch, and Kalpee, evidence that Tantia Topee, their leader, had been befriended by Narrain Rao. In the palace also was found the chief part of the booty now to be distributed, consisting of specie, jewels, and diamonds. (4)

After orders as to the campaign.

The above is a general outline of the campaign as far as it exhibits the circumstances under which the booty at Banda and Kirwee was captured, and the relation of Sir H. Rose and General Whitlock to each other. But it happened that at the close of the campaign, and before any controversy about booty had been raised, the relation between these two officers and also General Roberts became the subject of some observations from the military authorities at headquarters.

In a dispatch addressed to the chief of the staff, on the 30th May, 1858, after the fall of Kalpee, Sir H. Rose, after referring to the recapture which had taken place by the enemy of the city of Chundairee, which his first brigade under General Stuart had taken in the month of March, observes:

> In a telegram which I wrote after forcing the passes through the mountainous ranges which divide Saugor from the Shahghur and Chundairee districts, I had the honour to say that I required troops to occupy the country which I took as I went on. I am quite aware that if there had been troops to send for the purpose I stated, they would have been sent. But the continual advance of my force without reserve has been the cause that some of the country I left at a great distance behind me has been partially reoccupied by the rebels.

(1) IV.—164, 173.
(2) Gazette, 35.
(3) IV.—164.
(4) VI.—164. Supplementary, O.

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Upon this the chief of the staff, in a dispatch to Colonel Birch on the 2nd of June, remarks, vi. 262:

Sir Hugh Rose dwells on the fact of his having had no reserves. This is hardly an accurate statement. The troops at Mhow and the Rajpootana column gave him an effectual support on his left flank, and kept his direct communication by the Agra road free, as shewn by the detachment of one of Major-General Roberts' brigade at Jullalpore, under the orders of his lordship, when Sir Hugh Rose became alarmed for his rear.

On his right flank, he was in like manner assured by the laborious march of Major-General Whitlock's brigades, which actually operated at Banda in time to render the capture of Kalpee, aided as Sir Hugh Rose was by a column formed in the Doab to co-operate with him from the left bank of the Jumna, comparatively easy of accomplishment.

The general order published to the army on the 9th June was, so far as material to the present case, in the following terms:

II.—282.

Under instructions from the right honourable the governor-general, a large plan was designed, by which the resources of the three presidencies, after the arrival of reinforcements from England, should be made available for combined action.

Thus, while the army of Bengal, gathering strength from day to day, has recovered the Gangetic Doab, restored the communications with the north-west of the empire, relieved the old garrison of Lucknow, afterwards taking that city, re-occupying Rohilcund, and finally assuring in great measure the tranquillity of the old provinces, the three columns put in movement from Madras and Bombay have rendered like great and efficient services in their long and difficult marches to the Jumna, through Central India and Rajpootana.

These columns, under the command of Major-Generals Sir Hugh Rose, K.C.B., Whitlock, and Roberts, have admirably performed their share in the general combination arranged under the orders of his lordship the governor-general.

That combination was spread over a surface ranging from the boundaries of Bombay and Madras to the extreme north-west of India.

Again, after the fall of Gwalior, another general order was issued, dated Calcutta, 22nd June, 1858:

II.—283.

The commander-in-chief congratulates Major-General Sir Hugh Rose very heartily on the successful result of his rapid advance on Gwalior.

2. The restoration of the Maharajah Scindiah to his capital, by the force under the command of the Major-General, is a happy termination of the brilliant campaign through which the Central India Field Force has passed under his able direction.

3. That campaign has been illustrated by many engagements in the open field, by the relief of Saugor, the capture of Rathgurh, Shahgurh, and Chundairee; by the memorable siege of Jhansi, by the fall of Kalpee, and lastly by the re-occupation of Gwalior.

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4. His Excellency again offers his hearty thanks and congratulations to Major-General Sir Hugh Rose and the gallant troops under his command.

5. It must not be forgotten that the advance of the Central India Field Force formed part of a large combination, and was rendered possible by the movement of Major-General Roberts, of the Bombay army, into Rajpootana, on the one side, and of Major-General Whitlock, of the Madras army on the other, and by the support they respectively gave to Major-General Sir Hugh Rose, as he moved onwards, in obedience to his instructions.

6. The two major-generals have well sustained the honour of their presidencies.

7. The siege of Kotah and the action of Banda take rank amongst the best achievements of the war.

8. The commander-in-chief offers his best thanks to Major-General Roberts, to Major-General Whitlock, and the various corps under their command. He is happy in welcoming them to the presidency of Bengal.

By order of his Excellency the Commander-in-Chief.

(Signed) W. MAYHEW, Lieut.-Colonel,
Adjutant-General of the Army.

A donation of six months' batta was given to each of the three columns, but, it should be observed, at different times, the dates of the respective donations being—

For Sir Hugh Rose's (1) column . . . June 19, 1858.
For Sir H. Roberts' (2) column . . . September 29, 1858.
For General Whitlock's (3) column . . November 13, 1858.

Finally, with regard to medals and clasps for the campaign, on the 7th of April, 1859, was announced the decision of her Majesty that the following was the most just, and therefore the most desirable arrangement:

1. That the medal should be granted to all engaged in operations against the rebels or mutineers.

(2, 3, and 4. Arrangements as to granting of clasps for "Delhi," "Defence of Lucknow," and "Lucknow.")

5. That a clasp for "Central India" should be granted to the troops of the columns under Major-General Sir Hugh Rose, G.C.B., engaged in the operations against Jhansi, Kalpee, and Gwalior; and also to the troops which, under the command of Major-Generals Roberts and Whitlock, respectively, performed such important services in Central India.

Claim of Sir Hugh Rose.

This detailed history of the campaign enables me to examine

(1) I.—74, 75. (2) I.—74. (3) I—75, 77.

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the claim of Sir Hugh Rose to share in the booty taken by General Whitlock's force. In supporting this claim Sir Hugh Rose has to contend against the broad facts, that throughout the campaign the two forces were separated from each other, on an average, by about 150 miles; that no junction between the two was ever effected; that at the time of the capture of Banda Sir Hugh Rose was encamped 160 miles off, at Jhansi, preparing to march on Kalpee; and at the time of the capture of Kirwee he was also about 120 miles off, at Kalpee, just setting off with the utmost speed in the opposite direction, the direction of Gwalior. He claims, however, to be held constructive captor of the booty taken in both places, and on the two grounds of association and co-operation.

The first question is, whether military association, such as I have defined it, existed between Sir Hugh Rose and General Whitlock. The fact that Sir Robert Hamilton, in virtue of his political authority, gave instructions to both commanders, even if he apportioned to each his duties according to some general plan, and with reference to the duties assigned to the other, would not, as I have already observed, constitute military association. Then, looking to the relation of the two officers, I cannot doubt that they held co-ordinate commands; in other words, that General Whitlock was not subordinate to Sir Hugh Rose, and that Sir Hugh Rose had no authority to give commands to General Whitlock. It is true that, with regard to the directions sent by Sir Hugh Rose to General Whitlock (then at Mandala), to advance direct to Jhansi to his assistance, the governor-general wrote in his diary, "Sir H. Rose had ordered the force direct on Jhansi;" but I should be unduly straining a casual phrase in a document of this kind if I construed these words to mean that Sir Hugh Rose had sent a peremptory order, when the whole course of the campaign proves that such an order would have been beyond his power. He would never have petitioned, as he did to Lord Clyde after the fall of Jhansi, to have the command assigned to him of both columns, if he had possessed it already; nor subsequently would he have applied to so many authorities, both military and civil, for General Whitlock to help him before Kalpee, if a simple order from himself would have been sufficient for the purpose.

Then the event, in which by the rules of the service the com-

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mand of both columns would have devolved on Sir H. Rose as senior in rank to General Whitlock, never took place; no junction in the field was ever effected. The attempt to combine the forces before Jhansi, and the attempt to combine them before Kalpee, alike led to no result. But had it been otherwise, and had General Whitlock in effect been associated with Sir H. Rose in the capture of Jhansi or Kalpee, or both, it would by no means follow that Sir Hugh Rose would be held to be associated with General Whitlock in the capture of Banda and Kirwee. The association might have been only temporary. The result, then, is, that, from first to last, Sir Hugh Rose never was in a position to give orders to General Whitlock. This materially distinguishes this case from that of the *Empress* (1), on which counsel seemed to rely. In that case there were two vessels pursuing and two pursued; one pursued one, and the other the other; one of the vessels pursued was taken. Lord Stowell held both pursuing vessels entitled to share, on the ground that there was "a common pursuit, though of separate objects." But what made it a common pursuit it is clear was the fact that the senior of the two commanding officers had assumed the command, and that it was by his directions that the junior commander chased one vessel whilst he himself chased the other.

On these grounds I am of opinion that there was no military association of the two forces sufficient to found a title on the part of Sir H. Rose to share in the booty taken by General Whitlock. But I will not leave the case here. I am willing to consider how far there is a foundation of fact for the contention of Sir Hugh Rose's counsel that the two commanders were engaged in a common enterprise, which they carried out in concert. To begin, then, with the original formation of the two columns. They were organized in the two presidencies of Madras and Bombay about the same time, and as part of a general plan put forth by the supreme government. The supreme government thought it advisable at the time to apprise each presidency of the instructions sent to the other. To a certain extent the two columns had a similar destination. Both were to march northwards; the lines of their advance were to be more or less parallel, and no other forces were placed between them; it was contemplated as possible,

(1) *Empress*, cited in *Rattlesnake*, 2 Dod. 36.

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under certain contingencies, that both columns should operate in Bundelcund and Saugor and Nerbudda territory, and this connexion was in part shewn by their very names, one being called the Nerbudda Field Force, the other the Saugor and Nerbudda Field Force. Then the Madras column was "indirectly to support" the Bombay column, and the two commanders were instructed to open communications with one another, and to render mutual assistance. Moreover, though General Whitlock was destined for Saugor, Sir Hugh Rose was in the first instance sent thither in order to save time. These facts are indisputable. But it is manifest that, nevertheless, the two commanders had practically separate and distinct operations assigned to them. One was to keep to the east, the other to the west. The instructions to Sir Hugh Rose were, after relieving Saugor, to press on northwards, so as to clear the commander-in-chief's left rear, and to leave Jubbulpore and Eastern Bundelcund to the Madras column under General Whitlock. Sir H. Rose, then, was not to go to the east. Subsequently, indeed, when at Saugor, he had sent to him from Lord Clyde a suggestion that he should go to Banda; but this was only to be in the event of his finding it imprudent to attack Jhansi; and, as it turned out, he did attack Jhansi, and did not go to Banda; indeed, at the very time the suggestion came to hand, he evidently contemplated General Whitlock as going to Banda. No occasion arose for any military concert, and the result was, that beyond communicating, the two commanders acted quite independently, Sir H. Rose marching on Jhansi, whilst General Whitlock was preparing to operate in the neighbourhood of Dumoh in the Saugor and Nerbudda territory.

Then came the order of the 13th March, for both to proceed to the relief of the loyal chiefs of Bundelcund. Here certainly was an enterprise confined to much narrower limits, and the order directing it clearly contemplated combined action between the two forces. But Sir Hugh Rose did not act upon that order. He did not march to relieve the Bundelcund chiefs; instead, he continued his march against Jhansi. It was urged that inasmuch as this marching against Jhansi proved effectual relief to the Bundelcund chiefs (because their assailants were drawn off to the defence of Jhansi, and were defeated in the battle of the Betwa), Sir Hugh

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Rose must be taken substantially to have obeyed the order. I think this was not the opinion either of Sir Hugh Rose himself or of Lord Canning. But granted that Sir Hugh Rose did materially contribute to the end proposed by this order, did he do so by the means directed, viz. combination with General Whitlock? The evidence seems to me to shew that he did not. His going to Jhansi was a persistence in his own previous design, made without reference to General Whitlock's movements. His subsequent application to General Whitlock for help against the army of the Peishwa came too late to be acted upon; the battle of Betwa was fought, and Jhansi was won by his own force, unaided and independent. I may add that Sir Hugh Rose took booty in Jhansi, and General Whitlock has never claimed to share in it. Nor, indeed, had he any pretence so to do. On no principle hitherto acknowledged of joint capture did General Whitlock contribute to the capture of Jhansi. If the booty then taken had been of a very large amount, and that at Kirwee had been inconsiderable, to allow General Whitlock's force to share in the booty of Jhansi would be a disregard of military usage, and in my opinion a manifest injustice to the captors of Jhansi.

Then as to the despatch, after the fall of Jhansi, of the Hyderabad Contingent under Major Orr across the Betwa to Mhow Rannypore. It was contended that this was in fulfilment of a plan, contemplated by Sir H. Rose immediately upon his receipt of the orders of the 13th of March, for combined operations by himself and General Whitlock in relief of the Bundelcund chiefs, but it appears that the despatch of this flying column was caused by circumstances posterior to the battle of the Betwa, viz. the flight of the rajahs of Banpore and Shahghur to Mhow Rannypore, and had for its object to secure Sir Hugh Rose's rear on his then projected advance to Kalpee, and to prevent disorder in the south of Bundelcund, the Shahghur and Chundairee districts, rather than to co-operate with General Whitlock. Whether or not communication did take place between Major Orr and General Whitlock is immaterial. There is no evidence to shew that they acted in concert, or that either regulated his movements by those of the other.

The relief of the Bundelcund chiefs thus failing to serve as a

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common enterprise to which the movements of both forces could be referred, the advocates for Sir H. Rose's claim were obliged to look elsewhere for one; and Mr. Fitzroy Kelly, in his able speech, urged that the common enterprise was the putting down of a Mahratta conspiracy. Now, as a matter of fact, Sir Hugh Rose and General Whitlock did each at different times and in different places fight against the same Mahratta chiefs, and these chiefs were more or less in league together. But I find nowhere any military order requiring the two commanders to consider the putting down of a Mahratta conspiracy as their common enterprise: and this being so, I can only accept the phrase as a popular representation of the effect of the campaign, or at best as pointing out the political objects of the military operations. In almost every case of two divisions operating in contiguous tracts of country, it would be possible to find some object, of a local or some other kind, which might be characterized as the common object of those two divisions, and of those two exclusively.

After the capture of Banda, there was again some prospect of the two columns acting in combination before Kalpee. On the 27th of April the chief of the staff wrote to General Whitlock, that, "if the country in the vicinity of Banda and to the eastward was sufficiently pacified to admit of the absence of his force from Banda for three weeks, he was to march up the right bank of the Jumna, to co-operate with Sir Hugh Rose, and then to retrace his steps immediately after the reduction of Kalpee." This, however, was a discretionary order, and, as events shewed, General Whitlock thought it wiser not to leave Banda. Finally, about the 21st of May, the governor-general sent what amounted to a positive order to General Whitlock, to march to Kalpee to Sir Hugh Rose's assistance; but this too had no result, for Kalpee fell before any step under the order could be taken.

In short, if the temporary digression of Sir Huge Rose to Saugor be excepted, it will be found that from first to last, throughout the whole of this campaign, lasting more than five months, the two generals pursued separate courses, independent of each other. Sir Hugh Rose held straight on in his advance upon Jhansi and Kalpee, which formed (to use an expression of Sir R. Hamilton's) the groundwork of his instructions, whilst General Whitlock, in obe-

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dience to his instructions, operated first in the Saugor territory, then in relief of the Bundelcund chiefs, and finally in the capture of Banda and Kirwee. On no occasion did either of the commanders actually deviate from his course for the sake of the other, though twice General Whitlock was on the point of doing so to assist Sir H. Rose. On no occasion was any military operation undertaken in common, least of all any having direct relation to Banda or Kirwee.

Sir Hugh Rose also claims upon the ground of co-operation, irrespective of association. By this I must understand him to say that, though he may not have been associated with General Whitlock, yet he rendered such services as directly led to the capture of the booty at Banda and Kirwee.

It cannot be denied that in a certain sense Sir Hugh Rose assisted General Whitlock. Sir H. Rose did the work originally assigned to General Whitlock when he marched the first to Saugor, relieved the garrison, and then cleared the surrounding district, by the capture of Raatghur, Garrakottah, and other forts. General Whitlock had only to march through a peaceable country and quietly take possession. But this service, however great, was performed by Sir H. Rose in January and February. General Whitlock did not take Banda till the middle of April, and Kirwee not till June, and each of these places is more than 150 miles from Saugor. Such co-operation is in my judgment altogether too remote.

No doubt also the victorious advance of Sir Hugh Rose after Saugor, and his brilliant success, were a support to General Whitlock, who was on his right flank, in a country, as he describes it, teeming with rebels. But I do not see that this service of Sir Hugh Rose was different in kind from that which is always more or less rendered by one division to its neighbouring division on either flank, and if so it cannot found a title to joint sharing of booty. On this point some stress was laid upon the opinion expressed (1) by the chief of the staff that the laborious march of General Whitlock had assured Sir H. Rose's right flank, and that his operations in Banda had been "in time to render the capture of Kalpee, aided as Sir Hugh Rose was by a column formed in the

(1) VI.—262.

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Doab, to co-operate with him from the left bank of the Jumna, comparatively easy of accomplishment." With regard to Banda, however, it must be borne in mind that, if the force which the Nawab of Banda threw into Kalpee was weaker both in numbers and spirits than it would have been but for his previous defeat by General Whitlock, yet, on the other hand, unless General Whitlock had expelled him from his capital, the nawab would probably have never gone to Kalpee at all. Be this, however, as it may, I have no hesitation in saying that the services rendered by General Whitlock to the Central India Field Force were altogether too indirect to be the basis of any claim by him to share as joint captor in the booty taken at Kalpee.

Again, it is certain that on more than one occasion Sir Hugh Rose diverted the enemy from General Whitlock. Thus, by besieging Jhansi he drew upon himself Tantia Topee, and a large, if not the principal, part of the forces against whom General Whitlock was marching in support of the loyal chiefs of Bundelcund. Again, by his attack on Kalpee he drew to its defence the Banda nawab, who had just been defeated and expelled from his capital by General Whitlock. No doubt, if Tantia Topee had chosen to stay behind and oppose General Whitlock's advance, General Whitlock would have found it a harder matter to pass the Punnah Ghaut and capture Banda. No doubt, too, Kirwee would not have fallen so easy a prize if the Banda nawab had remained to defend it. But such diversion of the enemy amounts only to an indirect, and I may say conjectural, relief of the friend, falling far short of that co-operation which justifies a claim to joint sharing of booty. On this point the analogy of the naval cases may be safely followed. I need not repeat the words of Lord Stowell, which I have already quoted. (1)

It was further argued, on special grounds, that the fall of Jhansi led directly to the capture of Banda, and in like manner the fall of Kalpee to the capture of Kirwee.

First, as to Banda. It is true that immediately after the fall of Jhansi Sir R. Hamilton wrote to General Whitlock, bidding him go to Banda, as the rebels had all been cleared away in the quarter of Mhow Rannypore or Jhansi; and that General Whit-

(1) Supra, p. 141.

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lock did go to Banda, and capture it. But I do not think that the right inference is, that General Whitlock could not have captured Banda unless Jhansi had previously fallen. The facts, when closely examined, shew that the only effect of the fall of Jhansi upon General Whitlock's movements was to alter his intention of diverging to Sir Hugh Rose's assistance, and to set him free to resume his independent course, which led him to Banda. Then it is clear that the intimidation produced by the fall of Jhansi had nothing to do with the capture of Banda. General Whitlock, in his approach to Banda, met with a stout resistance from the nawab and his army.

Similar considerations apply to the alleged effect of the fall of Kalpee upon the capture of Kirwee. It is true, that so long as Kalpee stood General Whitlock remained at Banda; and that as soon as Kalpee fell he went on to Kirwee and took it. But it was not the standing of Kalpee that detained him at Banda; it was that the Banda district, especially to the eastward, was in a disturbed condition, and in the opinion of the governor-general and commander-in-chief required the presence of British soldiery; and, moreover, General Whitlock's troops were suffering severely from sickness. Again, it was not the fall of Kalpee, but the coincident arrival at Banda of General Whitlock's second brigade, that enabled him to leave Banda. The fall of Kalpee had nothing to do with General Whitlock's marching on Kirwee, beyond this, that it was no longer necessary for him, on account of Sir Hugh Rose and the Central India Force, to turn to Kalpee. General Whitlock found himself, possessed of reinforcements, no longer under any obligation to divert them to the assistance of Sir H. Rose, and free to carry out the orders given to himself long before, to capture Narrain Rao, Prince of Kirwee. Accordingly, he marched to Kirwee. On his approach Narrain Rao and his brother surrendered without a blow, and their treasure fell into his hands. But there is not a tittle of evidence to shew that this surrender was in consequence of intimidation caused by the fall of Kalpee, a town 120 miles off, and on the other side of Banda. On the contrary, there is evidence that it was in consequence of the battle of Banda; for immediately after that battle Narrain Rao had opened negotiations with Major Ellis, who was then

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accompanying General Whitlock, offering to come in and surrender himself.

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On the whole, I am satisfied that there was no co-operation on the part of Sir Hugh Rose which led to the capture either of the booty at Banda or the booty at Kirwee. His claim having thus failed on grounds of both association and co-operation, I feel it my duty to pronounce against it altogether.

Claims of General Roberts, General Smith, and others.

The conclusion to which I have come, adverse to the claim of Sir Hugh Rose, relieves me from the necessity of considering in detail such claims of others as are derivative to his. Thus, as to the Rajpootana column, under the command of the late General Roberts; the scene of their operations was generally more than 100 miles farther west from General Whitlock's force than that of Sir Hugh Rose; their most approximate service to General Whitlock was the furnishing of a brigade under General Smith to protect the rear of Sir Hugh Rose on his march from Jhansi to Kalpee. It is manifest that Sir Hugh Rose's claim failing, that of General Smith must fail, and with his that of General Roberts also. To these I must add the claims of the moveable columns in the Doab, so far as they are founded on services rendered to Sir Hugh Rose in the reduction of Kalpee.

But there are other claims made, which are quite independent of that of Sir Hugh Rose.

Claims of Major Osborne and Lieut.-Colonel Hinde.

I will begin with the claims of Major Osborne and those under his command. When the rebellion broke out, it appears that Lieutenant, now Major, Osborne happened to be at Rewah, the capital of an independent territory which adjoins the Banda district on the south-east, but is separated from it by a range of hills. Lieutenant Osborne had just returned to Rewah with the rajah, whom, by special appointment, he had accompanied on a pilgrimage to Juggernautt, and was there, as I understand it, in the capacity of political assistant attached to the rajah. By his exertions the rajah remained firm to the British government, and offered the services of his troops and forces. On July 2, 1857, the governor-general sent to Major Osborne permission to obtain from the rajah special authority to take the command, and informed him that, as political assistant attached to the rajah, he would have direction of the rajah's troops in preference to any other

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officer, although of higher rank. (1) Accordingly the maharajah, in full durbar, gave him the entire command of his forces. With the rajah of Nagode, a small territory lying between Rewah and Banda, Lieutenant Osborne was equally successful, obtaining formal investment of the command of the troops. (2) But, besides these, he raised troops both in Punnah (3) and Rewah (4), called respectively the Punnah levy and the Rewah levy. The whole (5), that is, the Rewah and Nagode troops, and the Rewah and Punnah levies, were paid by the British government, and were under Lieutenant Osborne; the Rewah levy he placed under the immediate command of Lieutenant-Colonel Hinde. (6) On the 20th of July, 1857, he was (by way of temporary arrangement) appointed political agent at the court of Rewah. (7)

It is out of my province to speak of the gallant achievements of Major Osborne, the extraordinary ability he displayed, or the valuable services he rendered; they have received the strongest encomiums from those whose praise is most highly to be estimated. My duty is strictly confined to legal considerations. For this reason I pass over the general importance of Rewah being secured to the British government. Nor will I dwell upon several unrealised schemes of Lieutenant Osborne's for taking Banda and Kirwee. From a very early date, June, 1857, he seems to have been sensible of the importance of obtaining possession of those places. In May, 1858, one of these schemes, an attack upon Kirwee, was on the point of being carried out. Brigadier McDuff was bringing up General Whitlock's second brigade to join him at Banda, and Lieutenant Osborne procured the brigade to make a digression to Nagode, for the object (amongst others) of making an attack, in conjunction with his troops, upon Kirwee; he himself, with Colonel Hinde and the Rewah Levy, marched to Nagode and met Brigadier McDuff there, and matters went so far that

(1) Osborne's Proofs, page 10.
(2) „ „ 4, 1st Affidavit, paragraph 24.
(3) „ „ 3, „ „ 18.
„ „ 24, 3rd „ „ 4.
(4) „ „ 4, 1st „ „ 22.
(5) „ „ 6, 3rd „ „ 37.
(6) „ „ 4, 1st „ „ 15.
(7) „ „ 14.

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Lieutenant Osborne sent to Rewah for his heavy guns. (1) But, Brigadier McDuff changed his mind, and marched straight from Nagode to Banda. I mention these particulars, but nothing turns on them; it is impossible to hold that such unfulfilled intentions constitute co-operation.

I pass over also the various operations which Lieutenant Osborne and Colonel Hinde conducted with such singular success in the year 1857, because, granted that every word advanced on their behalf be correct, granted that many actions were fought with the enemy, the Great Deccan Road cleared, the British authority re-established, yet to allow these achievements, either separately or together, to influence my mind as to who should share in the captures at Banda or Kirwee would be, in my opinion, to disregard the principles on which the right to share as joint captors has hitherto been maintained. The important period for consideration cannot commence before the entrance of General Whitlock into the Bengal presidency. I proceed then to the year 1858. It appears that about the end of December, 1857, and the beginning of January, 1858, Lieutenant Osborne's troops, including those under Colonel Hinde, attacked and captured several forts in the neighbourhood of the Great Deccan Road, amongst others the fort of Jokahie, on January 19, through which General Whitlock's first brigade passed a month later on their road to Dumoh. This is now put forward as an act of co-operation of Lieutenant Osborne and Colonel Hinde with General Whitlock. Now it may be true that if Jokahie had not been already captured, General Whitlock might have had to perform that task; but admitting this to be the case, I am at a loss to conceive how the capture of that fort can be connected with the taking of Banda and Kirwee. In no sense can it be said to have encouraged the friend or intimidated the foe, unless, indeed, I were to adopt that boundless principle which has hardly been contended for, that the capture of any of the enemy's forts, the defeat of any of the enemy's troops, because tending to weaken the enemy's power, is therefore to be considered as contributing to the success of troops some four or five months afterwards in places at a distance of one or two hundred miles.

(1) Osborne's Proofs, 3rd Affidavit, page 23, paragraph 3.

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From this time I find it difficult to trace with certainty the movements of Lieutenant Osborne, beyond that on the 8th of May he was, as before mentioned, at Nagode, and that at the time of the capture of Kirwee he was at Rewah. (1) Colonel Hinde, at the end of February, seems to have returned with the Rewah levy to Rewah (2), to have left it early in May, and marched to Nagode, and there remained, carrying on operations thence against the enemy until November, 1858.

It was urged that the occupation by Colonel Hinde of Nagode, which was from fifty to seventy miles from Kirwee, was co-operation on his part with General Whitlock. But there is no evidence whatever that his presence at Nagode was felt at Kirwee. The same remarks apply to the occupation (3) throughout the whole period by Lieutenant Remington, with the Punnah levy, of Fort Kallinjur—a fort, according to Lieutenant Osborne, sometimes called the key of Bundelcund, distant from Banda about thirty-five miles, and from Kirwee about twenty-eight. It would seem that it was as much as Lieutenant Remington could do to hold his own at Kallinjur. (4) On the 30th of April the governor-general came to the opinion, apparently based upon representations from Lieutenant Remington, that it was very desirable the fort of Kallinjur should be rendered quite untenable, and gave orders for its destruction at the first fitting opportunity. (5)

Lieutenant Osborne further relies upon another alleged act of co-operation, immediately connected with the fall of Kirwee in respect of both time and place; I mean the despatch by him of a force, on or before the 7th of June, towards a fort called Manickpore, about sixteen miles east of Kirwee itself, made on the requisition of Mr. Mayne, collector of Banda, then accompanying General Whitlock.

The only evidence of this co-operation consists of a letter written by Lieutenant Osborne to Mr. Edmonstone, dated Rewah, 7th of June, in the following terms:

SIR,—I have the honour to report, for the information of the right honourable the governor-general, that having been requested by the collector of Banda to

(1) Osborne's Proofs. (2) Admissions to Colonel Hinde, page 11.
(3) Osborne's Proofs, 1st Affidavit, page 3, paragraph 18. (4) IV.—74.
(5) IV.—142.

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send troops to Manickpore, to prevent the rebels from Tirohan seizing the "Soork Kakillah" and making their way south, I have ordered 800 infantry, 100 cavalry, and 4 guns to proceed at once to Manickpore, to co-operate with the troops marching on Tirohan.

I have, &c.,
(Signed) W. OSBORNE.

The letter referred to of Mr. Mayne requesting troops has been lost, and therefore it is impossible to fix its date with precision; but I think it must have been before the capture of Kirwee. I say so for two reasons: first, because Lieutenant Osborne, after receiving the request, writes of General Whitlock's troops as "marching on Tirohan"; and secondly, because a letter from Mr. Mayne, to have reached Lieutenant Osborne at Rewah by the 7th, must have been despatched before the 6th, which is the earliest date that can be assigned for the fall of Kirwee. At the same time I am satisfied that Mr. Mayne did not ask for the troops to help General Whitlock in taking Kirwee. This seems to me clear from the terms of Lieutenant Osborne's letter, which states that the object for which the troops were wanted was "to prevent the rebels from Tirohan seizing the Soorke Kakillah, and making their way south"; and this is borne out by a subsequent letter of General Whitlock to the chief of the staff, which (1), after referring to the fact that Narrain Rao and Madho Rao had surrendered themselves on the morning of the 5th, states that Radho Gobind (their minister) had retired some days before to the fort of Manickpore, and, on receiving intelligence that a force was about to advance against him, had fled, and his troops had dispersed. The co-operation, therefore, which Lieutenant Osborne speaks of in this letter of the 7th as about to take place between his own forces and the troops marching on Tirohan, refers to co-operation which should or might take place after the capture of Kirwee had been effected, and not to anything to be done in order to effect the capture. It cannot found any title in Lieutenant Osborne or his troops to share in the capture. The acts of co-operation must precede the capture, and not succeed it. The cutting off of the enemy after the capture may be very meritorious, but it is not an act contributing to the capture.

Moreover, I have no doubt that this letter of Lieutenant

(1) Supplementary, R.

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Osborne of the 7th was written, and the forces despatched (for I must assume such despatch to have taken place immediately anterior to the writing of the letter), after Kirwee had fallen. It was indeed strenuously contended by the solicitor-general that this letter was written the day before the fall, because Major Ellis (1), in announcing that event to Sir R. Hamilton, names the 8th as the date. I will, therefore, state my reasons for holding that General Whitlock entered Kirwee on the 6th of June.

There seems to be no doubt that the surrender of the Princes Narrain Rao and his brother took place on one day, and that the capture of Kirwee followed on the next day. In this both the letter of Major Ellis (1) to Sir R. Hamilton and the telegram (2) of General Whitlock to the commander-in-chief of the Madras army agree. Now, that it was the 5th of June when the surrender took place appears from—

(1.) A paper (3) which is certified by the quartermaster-general of the Madras army to be a correct copy of the original draft of a letter from General Whitlock to General Mansfield, dated June 15, 1858.

(2.) An official communication (4) from Major-General Pears, of the India Office, which contains the following statement: "In a memorandum on the case of Narrain Rao and Madho Rao, prepared by Mr. Aitchison, under secretary to government of India in the foreign department, dated 25th August, 1860, it is stated that 'their surrender for trial was reported on 5th June, 1858, and Mr. Mayne, collector of Banda, in a letter dated 5th June, 1858, also reported that these persons had surrendered, but the date on which they gave themselves up was not stated.'"

Then that it was the 6th of June when General Whitlock entered Kirwee appears from a diary (5) of his route kept by Major Lawder, who was the acting deputy quartermaster-general attached to the Saugor Field Division, the original of which diary is in court.

This seems to me to settle the point that General Whitlock did enter Kirwee on the 6th, and quite to outweigh any evidence to

(1) IV.—164. (2) I.—177. (3) Plt.'s Supplements, 31.
(4) Supplementary Papers, R. (5) Plt.'s Supplements, 3.

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the contrary. This contrary evidence is twofold; first, Major Ellis's letter (1) to Sir R. Hamilton, which, in announcing both the surrender of the princes and the capture of the town, speaks of the capture as having taken place on the 8th; secondly, General Whitlock's telegram (2) to the commander-in-chief announcing the surrender of the princes; that telegram is dated 3rd June, Nulla Banda. If this last date were correct, the capture of Kirwee would have been on the 4th of June, which is a date still more unfavourable to Lieutenant Osborne. But in both cases I think there is error, possibly arising from the same cause, similarity of the figures; in the one case, 6 may have been mistaken for 8, and in the other 5 for 3.

For these reasons I think it my duty to pronounce against the claim of Lieutenant Osborne, Colonel Hinde, and those who assert their claim upon the same foundation.

Lieutenant Osborne and Colonel Hinde make a further claim for booty taken in the battle of the heights of Punwarree, fought in December 1858, and in Kirwee after it had been recaptured immediately subsequent to that battle. I reserve the consideration of this claim till I deal with the claim of Lieutenant Campbell.

Colonel Keating's claim.

The facts on which this claim is made are not disputed, and are as follows:

Colonel Keating is the colonel of the 50th Regiment Madras Native Infantry. That regiment throughout the whole of the operations formed part of General Whitlock's force and was under his orders, but was not present at the capture either of Banda or Kirwee. It was left behind at Jubbulpore, to protect that town and district when General Whitlock, in February, 1858, advanced northwards with his main column. But though they assisted in the duties of the garrison, the troops were under canvas and fully prepared to move at a moment's warning. On two occasions before the battle of Banda, a detachment of 100 rank and file was sent up by order of General Whitlock to join himself with his first brigade. After the capture of Banda, but before the capture of Kirwee, the regiment, by orders of General Whitlock, marched with his second brigade, under Brigadier McDuff, from Jubbulpore to join General

(1) IV.—164. (2) I.—177.

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Whitlock at his division headquarters; but when they arrived at Dumoh an order was received from General Whitlock that the regiment should go to Saugor. Accordingly to Saugor it went, and there remained till after the capture of Kirwee; but during the time it was at Saugor, it was, as it had been at Jubbulpore, encamped and equipped in readiness for any immediate march that might be ordered by General Whitlock.

I need not discuss the various grounds on which this claim was urged. I have already said that the Court will not make any distinction between two parts of the same division, both being in the field. I shall therefore admit the claim of Colonel Keating and the 50th Regiment. They will share as part of General Whitlock's force.

General Wheler's claim.

The facts of General Wheler's case are as follow:

Early in 1858 he was appointed to the command of the Saugor district and garrison. He reached Saugor on February 8th, and found that a few days before Sir H. Rose had relieved the garrison, and was encamped there with the headquarters of the Central India Field Force. Sir H. Rose stayed at or near Saugor during the month of February, and being senior in rank to General Wheler, gave him sundry directions, which seem to have been accepted by General Wheler as orders (1), and to have been carried out as such. Thus the garrison assisted Sir H. Rose in the capture of the fort of Garrakottah (2) on the 28th February, and when Sir H. Rose was forcing the Mudinpore Pass on the 1st March they made a diversion at Zalimpore, and on their way back took the fort of Patum. General Wheler also furnished Sir H. Rose with supplies, ammunition, guns, and cattle.

General Whitlock, at the head of the Saugor and Nerbudda Field Force, reached Dumoh on the 4th March. He had not yet received the orders to march into Bundelcund to relieve the loyal chiefs, so that at this time he was engaged in the execution of the original plan to restore order throughout the Saugor and Nerbudda territory. This plan would of course include the protection of Saugor itself, and very probably, though this is not proved, the adoption of Saugor for headquarters. However, in the first instance, Major Erskine, the commissioner of the district, had sug-

(1) Wheler's Proofs, 1, 3. (2) Wheler's Proofs, 26.

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gested operations to be immediately conducted against certain strongholds in the neighbourhood of Dumoh, and so General Whitlock left his force there, and proceeded, with division headquarters, to "visit Saugor, to arrange for the strength of its garrison and their accommodation." (1) His chief engineer seems to have given some directions to Captain Prior (then serving under General Wheler) (2) to erect temporary barracks for the accommodation of the soldiers of the Saugor and Nerbudda Field Force, and to alter and make additions to existing buildings for the same object, all of which directions were carried out.

General Whitlock returned to Dumoh, fixing his headquarters here, and on the 16th he received the orders dated the 13th March, which required him to leave the Saugor territory and march into Bundelcund to relieve the loyal chiefs. But he thought it injudicious to leave the Saugor district without some troops for its protection, as its safety depended on the Madras column, and accordingly he left detachments at Saugor, Dumoh, and Jubbulpore. Saugor had been specially unprotected, having a garrison only of 60 or 70 (3) European artillerymen. The detachment General Whitlock furnished consisted of 200 Europeans (1) and 75 natives, and these remained there till after the capture of Kirwee. Some time in the month of May they were reinforced by a further detachment of General Whitlock's forces, namely, by the headquarters of the 50th Regiment, which had been left behind at Jubbulpore. (4)

General Wheler continued at Saugor until after the capture of Kirwee, commanding the garrison and making sundry expeditions in the neighbourhood; but these expeditions were in the rear, as it would appear, of Sir Hugh Rose, rather than of General Whitlock. Thus, on the 29th March his troops captured Shahghur, and on the 14th of April the Fort of Patna.

Under these circumstances General Wheler claims to be deemed a constructive captor of the booty taken at Banda and Kirwee, and he bases his claim upon two grounds: first, that his force was part of General Whitlock's force; secondly, that he contributed substantial service towards the capture of the booty.

(1) III.—222. (2) Wheler's Proofs, 5, 27.
(3) Supplementary, V. and IV. 89. (4) Hinde's Proofs, Dyer's Affidavit.

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As to the first ground: the instructions to General Wheler are not before the Court, and there is no evidence of any order having been given to him by General Whitlock, except the order I have mentioned for the construction of barracks for the Madras column, when General Whitlock was present at Saugor. But it was urged that General Whitlock was senior to General Wheler, and therefore may be assumed to have given him orders, just as Sir Hugh Rose appears to have done; that the Saugor district was clearly under General Whitlock as commander of the Saugor division, and is expressly stated (1) to have been so by Sir Hugh Rose when he applied that it should be made instead a part of Central India, on the ground that it geographically and strategetically belonged to Central India; in short, the argument was that the Saugor garrison under General Wheler cannot be distinguished from the detachments of General Whitlock's force which were stationed there. I am, however, of a different opinion. The order given by General Whitlock for barrack accommodation does not prove that he commanded General Wheler and his force; it was just such an order as one officer might give to another junior to himself upon their meeting incidentally in the course of their duties. It was not till long after the fall of Kirwee, viz. not till July 7th (2), that General Whitlock was assigned a territorial command, including Saugor district and General Wheler's force; up to that time General Whitlock was only commander of a moveable column, and General Wheler reported, not to him, but direct to the chief of the staff. This is no slight or technical difference. It means that General Whitlock had no power to give to General Wheler's force any orders conflicting with those which General Wheler had received; no power to order them up to Banda or Kirwee. They were fixed to Saugor as the permanent garrison of the place. They were therefore quite differently situated from General Whitlock's troops, which were temporarily placed at Saugor, but which were immediately under his orders, and which he might have sent for any day to join his main column.

The second ground on which General Wheler's claim is made, that he contributed substantial services to the capture, in my opinion, also fails. The order for barrack accommodation at

(1) I.—49. (2) Wheler's Proofs, 12.

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Saugor does not prove that Saugor was the base of General Whitlock's future operations. It was given before the order to march into Bundelcund, and whilst the contemplated field of operations was the Saugor and Nerbudda territory. Looking to the distance of Saugor, and the fact that General Wheler's force were fixed there as a garrison, I find it impossible to hold that his maintenance of the fort and district was co-operation in the capture of the booty taken at Banda and Kirwee.

Claim of General Carthew and the Futteypore moveable column.

Throughout the whole of the operations the subject of this reference, General Carthew and the Futteypore moveable column were engaged in the lower part of the Doab, which is the Delta between the Ganges and the Jumna. The strategic importance of the Doab is obvious upon a glance at the map. A strip of land protected on the north by the Ganges, always unfordable, and on the south by the Jumna, in the wet season also unfordable, and for the rest of the year fordable only with difficulty; so narrow as to be capable of being held by a small number of soldiers, and from its level surface fit for rapid military operations; this is the Doab, and the maintenance of it not only secured the Grand Trunk Road from Calcutta to Cawnpore, which, after leaving Allahabad, runs right through the Doab from south-east to north-west, but also established an effectual barrier between the hostile territory of Oude and the hostile territory of Bundelcund. The rebels and mutineers of these two territories were constantly passing to and fro across the Doab; upon the nearer approach of the forces of Sir Hugh Rose and General Whitlock the tide set rather from the south, northwards; large numbers frequently congregating on the right bank of the Jumna, at the ghauts or ferries, in the hope of finding an opportunity to get across. At one of these ghauts, called Chillatara, the high road from Banda to Oude crosses the Jumna, thence it traverses the Doab from south to north, and in doing so it crosses at Futteypore the Grand Trunk Road from Allahabad to Cawnpore. Futteypore, therefore, and Chillatara Ghaut were both points of special military importance. Futteypore is about seven miles south of the Ganges, and twenty-one north of Chillatara Ghaut. Chillatara Ghaut itself is only twenty-two miles in a northerly direction from Banda.

It was in December, 1857, that a column consisting of Madras

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troops was constituted by Lord Clyde to occupy the Futteypore district, and General Carthew was placed in command. His instructions, apparently given verbally, were to move his troops with rapidity, clear the Doab of rebels invading it from south to north, to menace the trans-Jumna provinces for the benefit of the forces simultaneously employed there; and General Carthew adds: "I was at the same time particularly directed to watch the operations of Sir G. Whitlock on his march from the south to the Jumna, and to intercept any rebels driven northwards by his force." General Carthew fixed the headquarters of his force at Futteypore itself, but a detachment was encamped on the river Pandoo Nuddee, about twenty-seven miles north-west of Futteypore, in a position to intercept rebels crossing from Bundelcund into Oude by Humeerpore Ghaut, and between these two camps the road was kept open by parties of soldiers passing daily up and down. These operations, though confined to the Doab, naturally produced their effect across the Jumna and at Banda. As early as the 28th of January, the lieutenant-governor of the central provinces in his official narrative of events announces, under the head of Banda, that "the rebel nawab is reported to have been much alarmed by the movements of the Futteypore column, as were also his army, many of whom had deserted in consequence." On the 21st of February, General Carthew received instructions from the chief of the staff to organize a moveable column, which was to be constantly employed in patrolling the district of Futteypore, and never to remain quiescent beyond the time necessary for the magistrate, who was to accompany the force, to execute his business. The command of this patrolling force was given to Colonel Christie, who held it until the 30th April, when he was ordered to Cawnpore, and succeeded by Colonel, then Major Middleton. It is quite unnecessary to follow the movements of this patrolling force; it is sufficient to say that they were engaged almost daily patrolling the northern bank of the Jumna, and in preventing the numerous rebels on the southern bank from passing into the Doab by any of the several ghauts, Chillatara, Humeerpore, Serowlie, &c. Colonel Christie, in his affidavit (1), adds that whenever the force approached the northern bank the rebels were

(1) Carthew's Proofs, p. 15, par. 4.

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under the impression that it was about to cross into Bundelcund, and accordingly turned out large detachments at the various ghauts in preparation to resist its passage.

On the approach of General Whitlock upon Banda General Carthew directed (1) Colonel Christie with the patrolling column to proceed to Chillatara Ghaut, to prevent any party of Banda rebels crossing that ford of the Jumna when driven forwards by General Whitlock. General Carthew also sent a spy into the enemy's camp, who brought back information of all that the Nawab of Banda was doing. On the 19th of April, the day of the battle of Banda, Colonel Christie (2) was at Chillatara Ghaut; and at the same time, on the opposite (the southern) bank, a large rebel force had stationed itself, with two guns, under Jodah Sing. Immediately after the battle Colonel Christie managed to send off a spy to General Whitlock, with all the information as to the position and movements of the patrolling force and also of the rebels at Chillatara. General Whitlock (3) wrote back to Colonel Christie in turn, informing him of his movements, and begging him to keep a good look out, and a few days afterwards, acting, no doubt, upon Colonel Christie's information, despatched a light column under Major Dallas to Chillatara, in order to clear the route. (4)

From this time until after the fall of Kirwee the operations of the Futteypore column continued to be of the same character. The country on the southern bank of the Jumna, and also to some extent on the north bank of the Jumna (5), was still in the hands of the rebels, and, notwithstanding the vigilance of the patrolling force, from time to time parties of rebels succeeded in making their way from Bundelcund to Oude, not, however, by the roads, but, as they could, across the country. With one of these parties Major Middleton (6) had a successful engagement on the 9th of May, for which he was made lieut.-colonel. About the same time there was a project for a concerted movement with a part of General Whitlock's force. Mr. Mayne (the collector of Banda,

(1) Carthew's Proofs, p.12, par.12,13.

(2) Carthew's Proofs, p. 15, par. 6, 7.

(3) Colonel Christie's Affidavit, Carthew's Proofs, p. 16, par. 7, 8.

(4) General Whitlock's route, Pt.'s Supplements.

(5) Captain Gordon's Affidavit, Carthew's Proofs, p. 24, par. 10.

(6) Captain Gordon's Affidavit, Carthew's Proofs, p. 24, par. 6.

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then with General Whitlock) wrote (1) to General Carthew to inform him that it was intended that a detachment from General Whitlock's column should march down the right bank of the Jumna, to re-establish order in the district; and he suggested that the Futteypore column should co-operate on the left bank. General Carthew seems to have given the necessary orders to Colonel Middleton, but, for some reason or other, not apparent, General Whitlock altered his mind, and the project came to nothing. From this time, May 9, onwards, Colonel Middleton's movements seem to have been more in the neighbourhood of Humeerpore Ghaut, and to have been directed to the assistance of Sir Hugh Rose in his attack on Kalpee. However, on the 28th of May, General Carthew furnished a guard to escort some treasure to General Whitlock across the Jumna. Of the proceedings of the Futteypore column at the particular date of the capture of Kirwee, the only account before the Court is that of Colonel Cadell, who states that "on or about the 7th of June he was, by the officer commanding the camp near Futteypore, sent to obtain information in the Doab immediately north of Kirwee, as to the then anticipated escape of the petty Rajah of Kirwee into Oude, and that he (Colonel Cadell) narrowly escaped being captured by a portion of the troops of the said rajah, who were then marching across the Doab. The said troops, however, were not marching by any roads, but across the country, and were therefore unaccompanied by any wheeled carriage."

The above, I believe, is a fair statement of the facts upon which General Carthew now claims to be held a constructive captor of this booty. So far as his claim rests upon assistance rendered in the reduction of Kalpee, the Court has already disposed of it in dealing with the case of Sir Hugh Rose, and I have no intention to revert to it. But General Carthew also maintains that in guarding the line of the Jumna he was associated with General Whitlock, and also co-operated with him in the capture of Banda and Kirwee. In my opinion the claim of association is not established. General Carthew was never under the orders of General Whitlock. I do not understand that part of General Carthew's affidavit wherein he states that by his original instructions given to him in De-

(1) Pleadings, page 18, Document E.

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cember, 1857, "he was particularly directed to watch the operations of Sir G. Whitlock on his march from the south to the Jumna, and to intercept any rebels driven northwards by his forces," for at that time, December, 1857, General Whitlock was still in the Madras presidency, and it was not contemplated that he should advance beyond Saugor, which is at least 200 miles from the Doab.

Then as to co-operation. The question is, whether the guarding of the line of the Jumna can be connected with the fall of Banda or the capture of Kirwee; whether it can be held to have occasioned encouragement to the friend and intimidation to the foe. In one respect the claim of General Carthew is favourably distinguished from the claims of others which I have already considered, comparative proximity to the scene of capture. Throughout the whole of the operations against Banda and Kirwee General Carthew was from 22 to 50 miles distant from General Whitlock and no more. But against this must be set the fact that General Carthew was expressly prohibited from crossing the Jumna, and therefore he could not, while acting in conformity with his orders, render any actual assistance at Banda or Kirwee. This difficulty, however, Mr. Mellish would meet in the following way. In the first place, he argued, the rebels never knew of this prohibition, they always expected General Carthew to cross the river, and therefore, they were as much intimidated by his force as if the prohibition had never existed; secondly, that the prohibition was no obstacle to effective co-operation. As to Banda, on the very day of the battle General Carthew's force kept a body of rebels occupied at Chillatara Ghaut who with their two guns would otherwise have gone to the assistance of the nawab. As to Kirwee, it fell in consequence, not of being assaulted by General Whitlock, but of being invested; General Carthew's force contributed to that investment by guarding the line of the Jumna no less than if they had been nearer; they effectually shut it off on the north, and thereby, on the one hand, prevented Narrain Rao from escaping with treasure, guns, or any number, into the still hostile territory of Oude; on the other acted as a covering force to General Whitlock by cutting off all succour which might come against him from Oude.

I have given my best attention to this argument, but it has failed to convince me. As to the rebels under Joder Sing at

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Chillatara Ghaut on the day of the battle of Banda, there is nothing to connect them with the nawab, they were probably only one of those numerous bodies of rebels who roved about the country, and from time to time congregated at the ghauts of the Jumna. In fact, this very Joder Sing was captured a few days afterwards by the Futteypore column, as a fugitive attempting to get across the Doab. Then with regard to Kirwee: I see no ground for saying that Kirwee was taken by investment; it seems to me it was taken because General Whitlock marched upon it. There is no evidence to shew that, in point of fact, there was any rebel reinforcement coming to Kirwee which General Carthew intercepted. The closing of a road which the fugitives from Kirwee might possibly have chosen for their escape cannot amount to co-operation in the capture itself. The position of the Futteypore column, which had assigned to them the special duty of patrolling the Doab, and was prohibited from crossing the Jumna, may, I think, be fairly compared to that of a squadron of ships engaged in a blockade. It is well settled that ships so engaged are considered as fixed to their station by their duty, and have no claim to be joint captors of a prize taken in their sight by another vessel. The prohibition to cross the Jumna is fatal to the claim of General Carthew. I am of opinion that guarding the Doab was no co-operation in the capture of Banda or Kirwee.

General Maxwell's claim.

The claim of General Maxwell rests upon similar grounds to that of General Carthew. General Maxwell was in December, 1857, placed in command of a moveable column likewise operating in the Doab, though in a higher part of it, in a north-westerly direction from the Futteypore column, nearer to Kalpee, that is, and therefore more distant from both Banda and Kirwee, his headquarters being Akbarpore, between Secunderabad and Humeerpore. He received similar instructions to those given to General Carthew, viz. to patrol the Doab and intercept rebels passing from Bundelcund to Oude and vice versâ, but not to cross the Jumna. As a matter of fact, however, his force twice quitted the Doab; once in the month of March, when it was temporarily withdrawn by Lord Clyde as a re-enforcement for Lucknow, on which occasion it was as hastily sent back, on Lord Clyde finding that the Bundelcund rebels had taken advantage of its absence to break into the Doab; and a

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second time, when Sir Hugh Rose, upon his own responsibility, called over a portion of the force to the south bank of the Jumna, to support him before Kalpee, a breach of orders for which he was subsequently censured by Lord Clyde.

The claim of General Maxwell to be considered a joint captor of this booty is placed upon two grounds, 1st, that he assisted in the reduction of Kalpee; 2nd, that he guarded the line of the Jumna. As to the first, I need say no word. It is not disputed that in the reduction of Kalpee, Colonel Maxwell's column not only was associated to Sir Hugh Rose's force, but rendered the most eminent services; but it is obvious that with regard to any merit in the capture of Kalpee and any consequences arising from that capture, Colonel Maxwell cannot put his claim higher than that of Sir Hugh Rose.

Then as to the second ground, that in guarding the line of the Jumna he co-operated in the capture of Banda and Kirwee: his claim is open to all the objections for which I have disallowed the claim of General Carthew, and to this besides, that General Maxwell was further removed than General Carthew from the scene of General Whitlock's operations.

I can therefore come to no other conclusion than that the claim of General Maxwell fails altogether.

Lieutenant Campbell's claim.

The next claim is that of Lieutenant Campbell, who was attached to the Saugor and Nerbudda Field Force, in the capacity of special field engineer, commanding a company of the Madras Sappers and Miners, and his prayer is that the Court may award to him and his company 25 per cent. of certain treasure which they discovered and dug up in Kirwee, not upon its surrender in June, 1858, but on its recapture at the end of December in the same year.

The plaintiffs, General Whitlock and his force, do not deny that some treasure was dug up in Kirwee on the occasion named, but state their belief that the whole was at the time claimed by Mr. Carne, the civil officer of the district, as the property of a loyal native of India, and was delivered up by the capturing officer to Mr. Carne, on behalf of the local government, and no part of it became booty of war. The account given of the transaction by Lieutenant Campbell himself in his letter—for he has made no affidavit—to a certain extent tallies with the statement of Major Clifton; he says he did deliver up the treasure to Mr. Carne; but

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it is evident he has never heard of any restoration having been made to the native owner, for, on the supposition that the treasure had been recognised as booty, he has twice applied for a special share in it, once in 1860 to the prize agent, and again in September, 1862, to the examiners of the prize accounts. And if such restoration took place, the fact is somewhat remarkable that no record of the matter should have found its way to the India Office, even so late as 1865. What, therefore, has become of this treasure the Court is unable to say. But it is clear, from Major Clifton's affidavit, that no part of this treasure has been accounted for by the prize agents as booty, or is included in the fund now awaiting distribution. This being so, the Court cannot interfere. The Court has no jurisdiction to decide what is booty, and what is not. That, I apprehend, is the duty of the local government of India; the course being for the local government in the first instance to decide what is booty, and having ascertained that, to report to the Treasury that there is so much booty at the disposal of the Crown, and then the Crown disposes of it at its pleasure. I interpret the Order in Council as referring to the Court the distribution only of such property captured at Banda and Kirwee as has been already found to belong to her Majesty in right of her royal prerogative. I cannot institute a judicial inquiry as to whether any property captured ought to be treated as booty, or make an order contingent upon the event of any further property being deemed booty. I must therefore decline to entertain Lieutenant Campbell's claim.

A share in this same treasure dug up at Kirwee is claimed by Major Osborne and Colonel Hinde, but this claim is of course open to the same objection, that the Court has no jurisdiction to entertain it.

They further claim, however, a share in the booty captured in the field operations near Kirwee in December, 1858, in which operations they took part. As to this, Major Clifton, the prize agent, deposes that the only booty then captured consisted of four elephants, the sale of which produced 2100 rupees, or 200*l*. It is possible that more may have been captured, but certainly no more is now at the disposition of the Court. The sum being so very small, any order for its separate distribution would practically

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result in benefiting no one. I shall therefore leave this sum to fall into the rest of the booty now to be disposed of.

I now come to the claim made on behalf of the late Lord Clyde, as commander-in-chief. I will consider first the prize decisions, and then what has been the practice in the distribution of booty.

To a certain degree the right of a commander-in-chief to a share in booty taken by his army is analogous to the right of the flag officer to naval prize taken by a ship on his station. But the naval decisions do not give much assistance, because they turn upon terms of the royal proclamation made at the commencement of the war during which the prize was taken, the words of the proclamation being, as Lord Stowell observed, "the title deeds of flag-officers." And these words have from time to time undergone alterations; but such alterations, it should be observed, have had a uniform tendency which Lord Ellenborough, in interpreting a proclamation made in 1797 (1), thus describes:

> The Crown has proceeded progressively and constantly upon the principle of appropriating that share of reward which at first was annexed to the mere station of commander-in-chief, still more and more to the *immediate, actual, and present exercise* of the efficient functions of principal commander, narrowing from time to time by such successive alterations the advantages before allowed to the *non-resident* commander-in-chief, if I may so call him, and conferring them where it should seem that public policy and the interest of the service required that they should be conferred—namely, on the principal, *present*, and *effective* flag-officer of the station.

However, it may be said generally, that an admiral, on his station, provided he is de facto in command there, is entitled to a share in every prize taken by a vessel under his command; under no proclamation hitherto issued has it been made a necessary condition that he should have been present at the capture, or that he should have ordered it, or that he should have been at sea at the time. To this right of the admiral there are, strictly speaking, no exceptions; the two so called are exceptions only in appearance. They are: 1. No flag-officer commanding in a *port of the United Kingdom* shares in prizes made by any ship sailing from such port by order of the admiralty. 2. An admiral does not share a prize taken within the limits of his station, or by a vessel that would nominally be under his command, if the capturing vessel, being

(1) *Lord Nelson* v. *Tucker*, 4 East, 238, 251.

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destined for a special independent service, has for that purpose been subtracted from the admiral's authority by paramount orders from the admiralty. (1)

With regard to the right of the commander-in-chief to share in booty taken by his troops, no case has been produced where he has shared if he has not been personally in the field. On the other hand, there are a number of cases where the commander-in-chief, not having been in the field, has taken no share, such as Chinsurah, Serampore, Coorg, Concan, Delhi, Dhar, &c. Some of these cases are unimportant, the booty taken having been small, and the commander-in-chief not having put forward any claim. But in the Kittore case it was otherwise. Sir Charles Colville, the commander-in-chief of Bombay, had himself planned the expedition against Kittore, and organized the forces, but remained at Bombay; upon the capture he presented a memorial to the Lords of the Treasury to be admitted to share as commander-in-chief. The memorial was then referred to the directors of the East India Company, and they, in a dispatch dated 28th March, 1827, reported that "they had adverted to the usage of the army in India in cases where the commander-in-chief had not taken the field, and were of opinion that the claim of Sir Charles Colville was inadmissible;" accordingly in the distribution of the booty he was passed over. This case manifestly deserves the greatest attention, first, because a claim was actually put forward by the commander-in-chief, and deliberately rejected; and, secondly, because the ground of the rejection was that the claim was inconsistent with the usage of the army in India. Mr. Rolt argued that the Kittore case and the other precedents were not binding upon this Court; that to attach to the right of the commander-in-chief to share in booty taken by his troops, a condition that he himself should have been in the field, was to adopt a distinction which was not recognised in analogous cases of naval prize, which would lead to inconvenient complexity, and which rested on no solid foundation. He urged that with the help of modern appliances of electric telegraph, railway, steamers, &c., a commander-in-chief might direct the movements of all the several divisions of his army more

(1) *Orion*, 4 C. Rob. 362. *San Antonio*, 5 C. Rob. 209. *The Desiree*, 4 C. Rob. 422.

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effectually from the capital than if he were in the field with only one of them; and he pointed out the striking example furnished by this very war, where Sir Patrick Grant, then temporarily commander-in-chief of India, proposed to remain at Calcutta for the express reason that he would be better able thence to direct the military operations, and the proposition was approved of by the governor-general of India in council. Such arguments have great weight, and on future occasions may be proper matter for consideration for the advisers of the Crown, which can dispose of booty at its absolute discretion; but in the present instance, where reference is made to my judicial decision, and where the subject-matter is booty taken by the army of India, I think I should not be justified in setting aside the usage which has hitherto obtained in that army. I shall therefore hold, that to be entitled to share in booty, the commander-in-chief must be in the field.

The question is, what is the meaning of "being in the field?" Now, to be in the field, it is not necessary that the commander-in-chief should be actually present with the division which makes the capture; it is enough that he should be in the field with any part of the army; being in the field with one division he is in the field with all. This is well established. Thus, in the *Deccan* case, Sir Thomas Hislop, having been specially appointed commander-in-chief of the Deccan army, which consisted of several divisions operating hundreds of miles from each other, had under his personal command at times only one, viz. the first or advanced division, but he was held entitled to the commander-in-chief's share of the booty taken by each of the divisions. So again in the *Tarragona* case; in that case, for the purpose of a conjoint expedition of British land and sea forces, the Duke of Wellington, then serving as commander-in-chief of the British army in Spain, had detached some of his forces under the immediate orders of Lord William Bentinck, and at the same time in like manner Lord Exmouth, then admiral of the fleet there, had detached some vessels under the immediate orders of Sir Benjamin Hallowell. Booty was taken, and the warrant for its distribution amongst the two forces clearly recognised the Duke of Wellington and Lord Exmouth, though absent from Tarragona, to have been in the field, and therefore to be entitled to share as commanders-in-chief;

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for, after reciting that the Duke of Wellington had expressed his wish not to participate as commander-in-chief of the British army serving in Spain, it proceeded to appropriate one-eighth to Lord William Bentinck, Lord Exmouth, and such general officers and admirals under their command who were actually present at the capture of the booty; Lord W. Bentinck and Lord Exmouth to take one moiety, and the others the other moiety. (1)

But the right of the commander-in-chief to share in booty is subject to the same apparent exception as affects the right of the flag-officer to share in prize. If troops have been placed under the *independent* command of another, then the commander-in-chief, even if in the field with his army, does not share in booty taken by those troops, although under ordinary circumstances they would be under his command, either as having been detached from his army or as operating within the territorial limits of his authority. The reason for such exception is obvious. In such cases the commander-in-chief is not commander-in-chief of the troops taking the booty. Thus, in the *Mahratta* case, the commander-in-chief's share of the booty taken by the Deccan army went, not to Lord Lake, who was commander-in-chief of India and in the field, but to General Wellesley, who had been specially appointed independent commander-in-chief of the Deccan army. So, in the *Deccan* case, the commander-in-chief's share of the booty taken by the Deccan army in their daily operations fell, not to Lord Hastings, the commander-in-chief of India and in the field, but to Sir Thomas Hislop, who had been specially appointed independent commander-in-chief of the Deccan army. It is true that to Lord Hastings was awarded the commander-in-chief's share of the property, treated as booty, which fell into the hands of the East India Company at the close of the war, and of which there was no actual captor. But I need not dwell upon this, for, as I have already held, that booty stands upon quite a different footing to the booty captured at Banda and Kirwee, of which General Whitlock's force were beyond doubt the actual captors. Thus much as to usage on sea and land.

I will now proceed to the claim of Lord Clyde, but at the outset it may be convenient briefly to consider the powers of the governor-

(1) Prendergast, Law as to Officers of the Army, 254.

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general of India, and of the commander-in-chief of India, and their positions relative to each other.

By 3 & 4 Wm. 4. c. 85, s. 39, "the superintendence, direction, and control of the whole civil and military government of all the territories and revenues in India was vested in a governor-general and counsellors to be styled 'The Governor-General of India in Council.'" And by the 70th section of the same act it was provided that whenever the governor-general in council should declare that it was expedient that the governor-general should visit any part of India, unaccompanied by any member of the Council of India, it should be lawful for the governor-general in council by a law or regulation to authorize the governor-general alone to exercise all or any of the powers which might be exercised by the governor-general in council, except the powers of making laws and regulations. The statutory provision was taken advantage of early in 1858, when it was thought expedient that Lord Canning should leave Calcutta, and locate himself at the more central position of Allahabad, which is situated at the junction of the Jumna and the Ganges, and accordingly a local act (No. 4 of 1858), to last six months, was passed, conferring upon him the powers of governor-general in council.

For the time, then, Lord Canning was supreme. It was competent for him to give to Lord Clyde general directions as to the movement of troops. It was competent also for him, as a matter of right, to give directions to Lord Clyde's subordinates, but custom, courtesy, and regard for military discipline would alike require that such directions should, if possible, be communicated through Lord Clyde, or, if not, be notified to him without delay.

The military operations were of a kind peculiarly needing political superintendence. This was not an ordinary war between two armies, nor was it waged in a hostile country. It was a mutiny which prevailed throughout a vast territory under British rule or under British surveillance, and which shifted its scene from day to day, the mutineers being now dispersed over the country and then again gathering together in formidable numbers. Not only had those in arms to be put down; it was equally necessary to protect the loyal, to support waverers, and to restore civil order. Thus, considerations of peace mingled themselves with those of war,

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and each change in the complexion of political affairs involved a corresponding change of military tactics. Under these circumstances it was manifestly a convenient arrangement that the governor-general should occupy a central position, and that his political agents should accompany the moveable columns on their march in order to direct their movements so far as political purposes required, the commanders being bound to comply with such directions, except on military grounds they were imprudent or impracticable. Accordingly, Lord Canning took up his position at Allahabad, Sir Robert Hamilton was with Sir Hugh Rose from the beginning, and Major Ellis (Sir Robert Hamilton's subordinate) in like manner was attached to General Whitlock from the time he commenced his march through Bundelcund.

With regard to the power of the commander-in-chief of India, it would be a very difficult task to trace exactly its origin or to define its limits in accordance with the various documents on the subject. But, happily, this is not required for the purposes of the present suit. It is admitted that, though by the terms of his commission, Lord Clyde was appointed "commander-in-chief of all her Majesty's land forces serving in the territorial possessions of the East Indies (1)," and although, by virtue of such appointment, he was also "commander-in-chief of all the Company's forces in India (2);" yet in practice his power was subject to certain local restrictions; he did not direct the movements of troops in the Bombay presidency, except he was resident within the Bombay presidency, nor of troops in the Madras presidency, except he was resident within the Madras presidency. On the other hand, subject to the authority of the supreme government—an authority systematically exercised in time of peace, when the movement of troops is rather a matter for financial consideration than of immediate military necessity—he had the absolute control over all troops within the limits of the Bengal presidency as defined for military purposes, both those troops which belonged to that presidency and troops which belonged to either of the other presidencies. It should be observed here, that the territories of the three presidencies, as defined for military purposes, comprehend the whole of India; and, therefore, their limits do not correspond

(1) VI.—201. (2) 16 & 17 Vict. c. 95, s. 30.

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with the limits of the same presidencies as defined for civil purposes; for the latter would not include independent native states, &c. Sir Hugh Rose commencing his march from Indore was from the first within the military limits of the Bengal presidency, *i.e.* within the ambit of the commander-in-chief of India; General Whitlock entered the same ambit shortly after leaving Kamptee, early in January; but neither reached the civil limits of the Bengal presidency till much later.

The commanders of Madras or Bombay troops serving in the ambit of the commander-in-chief of India would ordinarily report to him as well as to the commander-in-chief of the presidency to which they belonged, though there seems to have been some irregularity in practice, since in November, 1858 (posterior, therefore, to operations at Banda and Kirwee), it was found necessary to pass a direct order (1) to that effect. The reports destined to the commander-in-chief of India would be addressed to the chief of the staff. This was an office originated in the Crimean war, for the relief of the commander-in-chief. The functions of the chief of the staff were defined by a memorandum (2) by Lord Clyde, made just before he left Calcutta. The adjutants-general and the heads of the respective departments of the two services, her Majesty's and the Company's, were directed in the first instance to bring all their business to the chief of the staff, but this arrangement was not to interfere with their duties or responsibilities, or with their customary correspondence with the secretary of government. All officers in command of detached columns on field service were directed to report to the chief of the staff, for the information of the commander-in-chief, instead of the adjutant-general; otherwise the existing routine of correspondence was to be preserved. Any direction given by the chief of the staff was to be taken as the absolute order of the commander-in-chief, the chief of the staff being proportionately responsible. It would appear, then, that if General Whitlock and Sir H. Rose were in "command of detached columns on field service," it would have been the duty of each of them, after crossing the military frontier of the Bengal presidency, to report to the chief of the staff, for the information of the commander-in-chief, and that any direction

(1) VI.—301. (2) Green Book, 3.

given to either of them by the chief of the staff would have been taken as an absolute order to them by the commander-in-chief.

The above will suffice as a general statement of the powers of Lord Canning and Lord Clyde respectively. Their movements were as follows: Lord Canning left Calcutta on the 28th of January, 1858, and reached Allahabad on the 4th of February, and there remained till after the operations the subject of this reference were over. Lord Clyde left Calcutta on the 27th October, 1857, and took the field at once in command of the column sent to relieve Lucknow. The relief was accomplished in the month of November.

In the month of January, 1858, Lord Clyde was at Futtehghur, on the Ganges.

From February 3 to February 8 he was at Cawnpore, except that on February 8 he was at Allahabad for an interview with the governor-general.

From March 1 to April 16 he was absent in Oude on the Lucknow campaign.

From April 16 to April 24 he was at Cawnpore.

From April 24 to May 25 he was absent in Rohilcund, conducting the campaign.

From May 25 to June — he was absent at Futtehghur.

Thus, at the battle of Banda (April 19) Lord Clyde was at Cawnpore; at the capture of Kirwee (June 2) he was at Futtehghur. Then as to the movements of the two columns. They have been already described. It is only necessary to say that, having once passed within the territorial command of the commander-in-chief of India, neither of the columns ever left it.

Under these circumstances General Eyre maintains that Lord Clyde was entitled to the commander-in-chief's share of the booty captured at Banda and Kirwee. The claim is resisted by the plaintiffs, on the ground that quâ the operations at Banda and Kirwee, Lord Clyde was not commander-in-chief in the field. Their counsel do not deny that Lord Clyde was commander-in-chief of India, that he gave orders to and received reports from General Whitlock, that the operations at Banda and Kirwee took place within the territorial limits of Lord Clyde's authority; or that, during the whole of the operations, Lord Clyde was in the

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field on the northern side of the Jumna. Nor did I understand them to dispute the decisions in the *Tarragona* and *Deccan* cases as shewing that the mere absence of Lord Clyde from the place where the booty was taken would be no bar to his claim, if he was in the field at the head of another part of the same army. But they contend that the Madras column was not a part of Lord Clyde's army, and that General Whitlock was not under the command of Lord Clyde. Of necessity the same position is attributed to Sir Hugh Rose and the Central India Field Force. It is a mistake, they urge, to suppose that either General Whitlock or Sir Hugh Rose was a divisional general under Lord Clyde; each held an independent command, subject only to the governor-general; their reporting to the chief of the staff and receiving orders from him may be explained as a mere matter of military routine, arising from the convenience that all military transactions within the limits of the authority of the commander-in-chief of India should pass through his office; but it was the governor-general and not the commander-in-chief from whom such orders really came, and for whom such reports were really destined.

To consider first the probabilities of the case. To invest a subordinate officer with an independent command within the normal sphere of the commander-in-chief's authority would certainly not be beyond the prerogative of Lord Canning, armed as he was with the powers of the governor-general in council; it would, however, be an extraordinary arrangement, and as such would require to be most strictly proved. But the hypothesis put forward by General Whitlock's counsel involves more than the creation of such an imperium in imperio. It involves that this extraordinary power should have been conferred, not upon one officer alone, but upon two officers at the same time, viz. General Whitlock and Sir Hugh Rose, neither commanding so many as 3000 men; and that each of these commanders, whilst independent of the commander-in-chief, should nevertheless for form's sake have received orders from and reported to his chief of the staff. Primâ facie such an arrangement seems quite anomalous and almost incomprehensible.

The command of General Whitlock was compared by his counsel to that of General Wellesley in the Mahratta war, and to that of Sir Thomas Hislop in the *Deccan* case; but each of those

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two officers, General Wellesley and Sir Thomas Hislop, was by the terms of his appointment declared to hold an independent command; each was commander-in-chief of the army which he led, that army consisting of upwards of 50,000 men, and each reported, not to the commander-in-chief of India, but to the governor-general. I am well aware that Sir Thomas Hislop reported to Lord Hastings, and that Lord Hastings was commander-in-chief of India. But Lord Hastings was also governor-general, and I have satisfied myself, by special investigation addressed to this very point, that it was solely in his capacity of governor-general that Lord Hastings received reports from or gave orders to Sir Thomas Hislop. With General Whitlock the case was the reverse; he was not commander-in-chief, but only a brigadier-general; he commanded, not an army, but only a moveable column amounting to no more than 2000 men; he reported regularly to and received orders from the chief of the staff, who was the organ of the commander-in-chief. There is no vestige of any formal appointment of General Whitlock to an independent command. The only general instructions to him which have been produced are those of the 17th November, 1857, which instructions are from the adjutant-general of the Madras army. It is, therefore, quite unnecessary to discuss the particular terms in which they were given, for no Madras authority, military or civil, could exempt General Whitlock from the control of Lord Clyde when he passed within the local limits of the power of the commander-in-chief of India. Such exemption could only proceed from the supreme civil power of India; but at this time, November 17th, there had not been even any communication from the government of India to the Madras government, as to the formation of the column under General Whitlock. It is enough, then, to say that these instructions were addressed to Brigadier-General Whitlock as commanding a field division, and operated only within the military limits of the power of the Madras commander-in-chief. They are the only general instructions that have been produced. It has not been even suggested that at any subsequent time before the capture of the booty at Kirwee, General Whitlock received any other *general* instructions, either from Lord Canning, or from the government of India, or from the commander-in-chief of India.

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In default, however, of any special document investing General Whitlock with this extraordinary authority, his counsel appealed to the general tenour of the correspondence, and to the whole course of the transactions.

They called the attention of the Court to many important orders addressed from the political power direct to General Whitlock without the intervention of the commander-in-chief, and this, they argued, would not have been done had General Whitlock been in a subordinate position. Thus, it was at the instance of the commissioner of the Saugor district (Major Erskine) that General Whitlock was preparing to make a series of expeditions in the neighbourhood of Dumoh. (1) It was the governor-general's political agent (Sir R. Hamilton) who, when Tantia Topee was besieging Chirkaree, suggested that General Whitlock should go to Banda (2), and who afterwards, on April 12th, upon the fall of Jhansi, gave to him positive directions to the same effect, directions which were subsequently approved by the Indian government. (3) It was the governor-general who sent to General Whitlock the order of the 13th March to go to the relief of the loyal Bundelcund chiefs (4); to whom General Whitlock, on the 28th April, reported that he had despatched from Banda a detachment to escort the Rajah of Chirkaree to his capital, and who subsequently expressed his approval of the same (5); who, at the end of April, was applied to by General Whitlock (6) for reinforcements, in order that he might assist Sir H. Rose before Kalpee; who at that time refused to send reinforcements (6), and who afterwards, on the 21st May, at the instance of Sir H. Rose, sent them to General Whitlock, and the order to march to Kalpee. (7)

The Attorney-General also dwelt upon the fact that Sir H. Rose, when urgently desirous to be reinforced by General Whitlock before Kalpee, did not apply to the commander-in-chief of India, who, if he had really commanded General Whitlock, would have been the proper person to apply to; but instead he applied to General Whitlock himself, to the governor-general of India, to the Bombay civil and military authorities, and even to the governor of

(1) IV.—76, 78, 79, 81, 85, 89, 91. (2) IV.—102.
(3) I.—70, 71. (4) II.—226. (5) IV.—139.
(6) Green Book, 28. (7) II.—243.

Madras, in fact to almost everybody except Lord Clyde himself. (1) 1866

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Again, as to the correspondence, General Whitlock's counsel contended that its whole tenour rebutted the presumption in favour of the subordination of General Whitlock to Lord Clyde. They cited many passages in support of this view, amongst others the following:

The military secretary to the Madras government, in answer to an application from the Bombay government, for General Whitlock to reinforce Sir H. Rose before Kalpee, replies thus by telegraph on the 5th May, 1858:

> General Whitlock is in communication with General Rose. He is acting under orders for governor-general. (2)

Lord Clyde himself, in writing to the governor-general on the 19th January, 1858, says:

> The Madras column, moving by Nagpore and Saugor, must be very near, if it has not actually reached the latter place. If your lordship were to suggest that it should continue its march to Banda, it would cause the mutineers and other rebels collected in that district, and at Kalpee, and other places along the left bank of the Jumna, to break up from that quarter. (3)

Sir Hugh Rose, in a letter to the governor-general, dated the 22nd February, 1858, writes:

> Under these circumstances I shall not play the game of my enemy, but take the road of Jhansi, then through the more open country by Kirl, striking off thence to Chundairee, skirting in this way the dangerous part of Bundelcund, falling, if I can, on the flank or rear of any strong position of the enemy assisting Tehree, and getting into communication with my first brigade, which is to arrive at Goona about the 28th instant. I shall make it a combined attack on Jhansi. . . . If the commander-in-chief would have the goodness to reinforce me at Jhansi, it would be advantageous.

The chief of the staff, in writing to the governor-general's military secretary on April the 25th, 1858, says:

> General Whitlock is now at Banda, and is waiting till his lordship the governor-general shall be pleased to indicate to his excellency (Lord Clyde) what directions he wishes to be given to the troops of that officer. (4)

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(1) III.—242. (2) III.—229. (3) Green Book, 7.
(4) Green Book, 26, 27.

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The chief of the staff commences a memorandum, dated the 27th April, 1858, for the guidance of General Whitlock, thus:

> Major-General Whitlock is informed that it is the opinion of the governor-general and the commander-in-chief that the native portion of his force should be cantoned at Banda till after the rains, while the European portion of it might proceed to Allahabad to occupy quarters. Major-General Whitlock is begged to give an opinion as to whether this would be prudent with respect to the constitution of his force. (1)

General Whitlock, in answer to a letter from Lord Clyde congratulating him upon the success of his campaign, and proposing that the Madras force should take charge of Kalpee, replies on the 29th of June, 1858:

> I was indeed proud to find the conduct of the Madras column had met with your approbation, and my only hope and desire is that we maintain the same character during the period we have the honour of being under your excellency's so immediate command.

I have selected the instances that seemed to tell most in favour of General Whitlock's position; but I do not propose to consider them in detail, but rather to deal with them all together in a few general observations.

The fact that the political agents of the governor-general gave frequent directions to Sir H. Rose and General Whitlock was only a part of the mode of civil administration that obtains in British India; it in no way affected the military subordination of those officers to the commander-in-chief. Sir Robert Hamilton did not supersede Lord Clyde.

Nor again does the giving of orders, however numerous, by the governor-general direct to General Whitlock prove that that officer had ceased to be subordinate to the commander-in-chief. A more natural explanation is furnished by the local situation of the parties. Sir H. Rose and General Whitlock were in Bundelcund; Lord Clyde was in Rohilcund or Oude, at all events comparatively inaccessible; Lord Canning was at Allahabad, much nearer, therefore, to Sir H. Rose and General Whitlock, and, as governor-general, armed with full powers, had an undoubted right to give to either whatever orders he thought proper. And there is no question that on occasion of emergency the governor-general

(1) I.—47.

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did give orders to those officers direct, without waiting to communicate with the commander-in-chief. But it is worth observing that all or nearly all of these direct orders were given whilst Lord Clyde was inaccessible. Thus it was whilst Lord Clyde was in Oude that the governor-general sent direct to General Whitlock the important order of March 13 to march into Bundelcund; it was during the absence of Lord Clyde in Rohilcund that Sir Hugh Rose, then before Kalpee, made the applications to Lord Harris and others for reinforcements, and that General Whitlock corresponded with the governor-general. Vice versâ, if Lord Clyde happened to be close at hand, it seems the regular course was followed, and the order from the governor-general passed through the commander-in-chief to the military subordinate. Thus, when Lord Clyde was at Cawnpore, Lord Canning, in transmitting to Sir Robert Hamilton directions that the Central India Field Force should pass over Jhansi, if not fully strong enough to take it, states that Sir Hugh Rose would receive instructions to the same effect (1); and on the same day (February 11th) such instructions actually were sent to Sir H. Rose by the chief of the staff. The correspondence of Sir H. Rose and General Whitlock with the governor-general in the absence of Lord Clyde was no displacement of the commander-in-chief's authority. No one knew this better than Lord Clyde himself; he knew what was the use of such correspondence, what the abuse. When he was starting for Rohilcund he sent express orders to Sir H. Rose that during his (Lord Clyde's) absence he should correspond with the secretary to government. (2) But, on the other hand, he reprimanded Sir Hugh Rose for addressing the governor-general with respect to the re-assumption of his command upon the occasion of the outbreak at Gwalior, instead of addressing himself, with whom he was then in communication.

Further: deferential expressions used by Lord Clyde of or to Lord Canning are not a confession that he was not commander-in-chief; they only attest the indisputable fact that as commander-in-chief he was subject to the governor-general. In serious matters, especially those removed from his eye, such as the disposal of the Madras column after the battle of Banda, it was

(1) II.—224, 225. (2) Green Book, 32.

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only proper that he should consult Lord Canning, and natural that he should announce the result of such consultation to General Whitlock as the opinion of the governor-general and himself. Nor was such language applicable to the case of General Whitlock and Sir Hugh Rose exclusively; it would have been equally appropriate if addressed to any divisional general under Lord Clyde's immediate command.

The other distinctions which were advanced to prove that General Whitlock's forces were not part of Lord Clyde's army seems to me also untenable. It is true that, how or when Lord Clyde's army was organized as a whole, and of what forces it consisted, does not appear; it is true also that Lord Clyde must have given more orders to, and been in more daily communication with the troops under his immediate command in Oude and Rohilcund; it is true also that those troops, and the troops under Sir Hugh Rose and General Whitlock were engaged in distinct operations which may be called campaigns, and that this distinction is attested in the order for the distribution of clasps, and other public documents. But this is no proof that from the time the Madras and Bombay columns came within the ambit of Lord Clyde's authority, they were less a part of his army than the troops which had been so from the first or which were under his immediate command. I see no reason to suppose that Lord Clyde was not equally and in the same sense commander-in-chief over all troops within the territorial limits of his authority, both those under his immediate command beyond the Jumna, and those far removed from him, whether at Saugor, or in Bundelcund, or elsewhere; or that, after the forces under General Whitlock had crossed the military frontier of Bengal, Lord Clyde was not their commander-in-chief, alike when they were marching through Central India, and when at their approach to the Jumna he welcomed them to the presidency of Bengal, and finally when on the 7th July (1) the governor-general assigned to them a fixed territorial duty.

The comparison of General Whitlock's position with that of General Roberts does not hold good. If Lord Clyde were not commander-in-chief in the field over General Roberts, a point unnecessary to be determined in this case, it would be no proof that he was

(1) Wheler's Proofs, 12.

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not commander-in-chief in the field over General Whitlock; for, so far as appears from these papers, General Roberts never quitted the presidency of Bombay, never came within the limits of Lord Clyde's authority, and never reported to him.

Then as to the reports made by General Whitlock to the chief of the staff and the orders received by him, it was said that they were just such as would have been issued had Lord Clyde never left Calcutta. This may be true, but has no bearing upon the question whether Lord Clyde was in the field; the reports and orders would be the same whether he was in the field or not. It was also suggested that they were merely formal; but I see no reason to doubt that they were what they appear to be, reports from and orders to commanders of detached columns on field service. The reports would then, to use the words of Lord Clyde's memorandum (1), be reports for the information of the commander-in-chief, and the orders would be the absolute orders of the commander-in-chief.

The plaintiffs, in my judgment, have wholly failed to prove that General Whitlock held an independent command, or that the column he led was not part of Lord Clyde's army; and as the burden of proof clearly lay upon them, it is unnecessary to review in detail the counter-proof advanced on the other side. But I may state my opinion that the evidence is overwhelming to shew that the position of both Sir Hugh Rose and General Whitlock was simply that of commanders of divisions under Lord Clyde; any other position is as inconsistent with the facts of the case as it would have been contrary alike to military practice and to public policy. The fact of reports and orders having passed between those officers and the chief of the staff, would of itself be almost conclusive of their subordination; but besides this, there is abundance of direct proof. It was as commander of a *division* that General Whitlock received his instructions (2); he commonly styled himself, and was styled by others, as the officer commanding Saugor Field *Division;* it is on behalf of that *division* that he originally presented (3) his claim for this booty. And that he was under Lord Clyde's orders

(1) Green Book, 3.
(2) II.—216, 218, 222. III.—182, 207. Green Book, 16, 24.
(3) I.—115, 116.

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is stated expressly by all parties concerned, by himself (1), by the Madras (2) government, by the Madras (3) commander-in-chief, and lastly by Lord Clyde (4) himself, who sends him thanks for the critical attention he had paid to his orders. It is equally clear that Sir Hugh Rose held a similar position, but I will only cite one instance. When that officer called a portion of Colonel Maxwell's troops across the Jumna to assist him before Kalpee, Lord Clyde wrote (5) to him: "I cannot permit the commander of a division to alienate forces to a special duty contrary to his orders without a reference to me." The whole matter is placed in the clearest light by a memorandum of Lord Clyde's, made indeed after the war, but without special reference to this question. (6)

I need say no more. A claim to be independent of Lord Clyde, which never was asserted, never could have been asserted in the field, cannot be entertained in this Court. I must hold that Lord Clyde was commander-in-chief over General Whitlock and General Whitlock's troops. Then that he was in the field is a matter of fact beyond dispute, and his absence from the scene of capture is, as I have said, immaterial. Lord Clyde, therefore, with regard to this booty, fulfilled in all respects the condition of being commander-in-chief in the field, and, in accordance with usage, he is entitled to a share in it.

Claim of the Staff.

The staff which accompanied Lord Clyde was as follows:

1. The chief of the staff, General Mansfield. His functions I have already described. Suffice it to say here that his office was an additional one, and did not supersede the duties of any other office or department.

2. The general staff, appointed by the governor-general in council. These properly consist of the adjutant-general and quarter-master general and their assistants: but the adjutant-general himself was not with Lord Clyde: he remained at Calcutta, and his duties were discharged by Colonel Norman, the deputy adjutant-general.

3. The personal staff, appointed by Lord Clyde himself, and consisting of a military secretary and several aides de camp. Amongst

(1) I.—115.
(2) III.—247.
(3) I.—164.
(4) Green Book, 42.
(5) Green Book, 33.
(6) I.—27.

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them was Colonel Metcalfe, who acted especially as Persian interpreter and commandant at headquarters.

The difference then between general staff and personal staff is a substantial one, both in respect of duties and mode of appointment. But it is to be observed that the term "personal staff" is only of modern use. The royal warrant of 1848, regulating the pay of the staff, was the first warrant of the kind which formally adopted the distinction between the two kinds of staff, general and personal: in the warrant which had obtained up to that time—a warrant issued in 1826—under the head of "staff" were included both kinds, personal as well as general.

So far as I can ascertain the practice in this respect of the Indian army, the right of the staff to share in booty has always followed that of the commander-in-chief. In the *Deccan* case (1) the officers of the general staff of the Deccan army under Sir Thomas Hislop participated in the booty captured by each of the divisions separately on the express ground that they belonged to all the divisions. In the distribution of the Scinde (2) booty the staff shared. These cases were before 1848, and therefore I presume the personal staff, though not expressly mentioned, were included. But the warrants for the distribution of the Delhi and Lucknow booty taken during this very war, expressly declare officers on the divisional, personal, and general staff entitled to share. In fact, whatever distinctions there may be in other respects, I see no reason why in the matter of sharing booty any distinction should be made between the personal and general staff, and in principle I think the right of both to share stands or falls with that of the commander-in-chief. As therefore I have held Lord Clyde entitled to share as commander-in-chief in the field, I shall hold that all his staff who accompanied him, personal as well as general, are entitled to share also. This will not include the adjutant-general, who remained at Calcutta, and who has very properly advanced no claim; but it will include General Mansfield, and such members of the personal staff as were in the field with Lord Clyde, but have made no claim. After grave consideration of the Order in Council referring this matter to this

(1) *Alexander* v. *Duke of Wellington*, 2 Russell & Mylne, 38, 39; Deccan Papers, vol. i. pp. 16, 17.

(2) Prendergast, Law as to Officers of the Army, 251.

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Court, I have come to the conclusion that I am authorized to make this order, and that I should not be justified in excluding officers or troops who on principle are entitled to share, merely because they have omitted to put in a claim.

The result of this judgment then is, that I declare Lord Clyde and his staff, personal as well as general, entitled to share in this booty captured at Banda and Kirwee; and, subject to this right, I award the whole of the booty to General Whitlock and his forces, including amongst the latter the troops under Colonel Keating, and any other troops left by General Whitlock on his march, but who at the time of the capture formed a portion of his division, and were still under his command. I disallow all other claims. The scale upon which the distribution shall be made to the several ranks is a matter which by the terms of the order of reference I am precluded from entering upon. It is hardly requisite for me to add that the view which I have taken of the whole matter renders it unnecessary for me to consider any booty captured by the forces of Sir H. Rose or the late Sir H. Roberts or any other of the claimants.

Costs.

There remains the question of costs. If this were an ordinary case I should hold that those who have preferred claims, which they have failed to establish, ought to bear the cost of their experiment. But, considering that this is the first occasion on which this jurisdiction has been exercised, considering also the conflict of opinion amongst the several authorities before whom the question was successively brought, and which led to the reference to this Court, I am not prepared to say that any of the claimants were not entitled to prefer their claim. I shall, therefore, in pursuance of the power given me by the Order in Council, direct that the costs of the various parties who appeared before me shall be paid out of the fund.

As to the taxation of costs, I am strongly of opinion that it will be a saving of much unnecessary expense and trouble, if each solicitor, instead of submitting his bill of costs to be taxed in the ordinary manner, item by item, presents his account of disbursements, counsels' fees, printing, &c., leaving it to the registrar of the Court to award a *quantum meruit*, sufficient to cover expenses out of pocket, and to afford besides a reasonable remuneration for professional services. I do not make a compulsory order on this head,

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but I shall be glad to see this arrangement accepted; and I direct that the registrar shall have power, upon application by any solicitor, to settle the taxation of his bill of costs in this general manner.

I know not whether the whole of the booty has yet been realized, but with a view to prevent any further delay in the distribution, I shall recommend to the Treasury to distribute such portion thereof as it may be in their power to do, reserving, however, an adequate sum to meet all possible costs that may have been incurred, the amount of which I shall be prepared to advise them, if necessary.

I cannot bring this judgment to a close without observing that I view with regret the disappointment it must occasion to many gallant claimants who have performed so many noble services during this mutiny. But, after the most deliberate consideration, I am well satisfied that my decision is accordant with the principles observed in cases of naval capture, and also with the usage which, in the main, has hitherto obtained, in the distribution of booty. To have carried the doctrine of constructive capture to the extent prayed for, would, I am convinced, have thrown the law and practice into confusion, have sown the seeds for frequent litigation, and been detrimental to the interests of her Majesty's land forces.

Solicitors for the actual captors: *Gregory, Rowcliffe, & Rowcliffe.*
Solicitors for other claimants: *Freshfields & Newman; Frere, Cholmeley & Forster; Warry, Robins, & Burges; L. Skipwith; Pritchard & Sons; Tebbs & Sons; Hume & Bird; Whitakers & Woolbert; G. A. Crawley, Arnold, & Green; Winter, Williams, & Co.; Parke & Pollock; W. M. Wilkinson; Took, Hallows, & Price; Jenner & Dyke; E. W. Crosse; Brooks & Du Bois.*

NOTE.—Some further information of interest with respect to the distribution of prize and booty will be found in a Blue Book published in 1864, entitled, "Report of the Commissioners appointed to inquire into the realization and distribution of Army Prize; with minutes of evidence, &c."

1866
April 16.

[IN THE ARCHES COURT OF CANTERBURY.]

TIARKS AND FENNING *v.* HUTTON.

Church-Rate—Irregularity in proceedings of Vestry—Excessive Rate—Legal Expenses.

At a vestry meeting, a motion having been made and seconded that a rate be made, an amendment was proposed that it was not legal or expedient to make a church-rate for the district. The amendment, and afterwards the original question, was put to the meeting; the first was negatived and the latter carried. A poll was demanded on the amendment only, and the vestry was adjourned for that purpose. On the day to which the vestry had been adjourned, the chairman declared the state of the poll under the headings—the number for the amendment and against the rate—the number against the amendment and for the rate; and declared the majority to be for the rate; and then dissolved the meeting without having put the original motion a second time:—

Held, that the proceedings, though irregular, were not sufficiently so to vitiate the rate.

A charge for the attendance of a legal adviser at the taking a poll, for legal assistance in making a church-rate, or for the salary of an organist in a wealthy town parish, if such charges have been sanctioned by the vestry, may be lawfully paid out of a church-rate, and a rate made to cover them will not be excessive.

THIS was a cause of subtraction of church-rate, brought by Henry Frederick Tiarks and William Wood Fenning, churchwardens of the district of St. Mary, Balham, in Surrey, against the defendant, Thomas Outhwaite Hutton, a parishioner of the district. It was instituted in the Court of Arches by virtue of letters of request under the hand and seal of the Commissary of Surrey. The libel alleged that, under an Order in Council, dated the 13th of August, 1855, a district was assigned to the church of St. Mary, Balham, being then within the parish of Streatham, Surrey; that the said district by virtue and operation of an act of parliament, entitled the New Parishes Act, 1856, has become and is now a separate and distinct parish for ecclesiastical purposes; and then alleged a notice of vestry on the 5th of June, 1864; a vestry meeting in pursuance of such notice on the 9th of June, 1864, when the probable expenditure for the repairs of the church, and other expenses for the current year, were estimated at about 163*l.*, and that a rate of 3*d.* in the pound was duly made.

The allegations in the answer of the defendant, so far as are material to this report, were that the church-rate was and is exces-

sive, and void by reason of such excess; that at the time the rate was made, there remained, or ought to have remained, out of the sums received by the churchwardens of the said parish or district, on account of the rate for the previous year, the sum of 24*l.*, or thereabouts, unapplied to any of the purposes expressly included or specified among items of expense which the said previous rate was required to defray, but which said sum had been expended in satisfaction of costs and expenses of litigation incurred by the churchwardens, and to the incurring of which the vestry of the said parish or district, or the majority thereof, had not consented; and in estimating the amount of the new rate that would require to be levied, no account was taken of such sum or surplus of 24*l.*, and such rate was accordingly illegally made, and the amount thereof determined without taking the same into account. That the amount actually received by the churchwardens on account of the present rate is 168*l.* 18*s.* 9*d.*, or thereabouts, and the amount expended by them during the year has been 161*l.* 8*s.* 3*d.*, although no account of such expenditure had ever been properly audited or allowed; and the churchwardens have further expended, or have stated that they intend to expend, the balances so received in part payment of costs and expenses of litigation, incurred without the consent and contrary to the desire of the vestry of the said parish, &c. That had the rate now sued for been a legal rate, and been applied to its proper and legal purposes, and had the amounts which ought to have been brought forward from the last preceding rate been taken into account, this rate would have been largely in excess of all the expenses which could be legitimately charged upon it, and there would, after defraying all such expenses, have been in the hands of the said churchwardens a balance of 54*l.*, or thereabouts.

From the evidence it appeared that in the estimate for the church-rate of 1863, a sum of 50*l.* for repair of stoves was included; during the year 1863—4, only 8*l.* of that sum was expended. At the meeting of the vestry on the 9th of June, 1864, the churchwardens' accounts for the previous year having been produced, a resolution was moved that the accounts be approved, to which an amendment was proposed that 42*l.* not expended on the new stoves should be carried forward to the churchwardens' account, and that an item, 20*l.* 5*s.* 4*d.*, for law costs should be disallowed. The

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amendment was rejected, and the accounts passed. A motion was then made that a church-rate be levied for the current year, upon which an amendment was moved, "That in the opinion of this vestry, it is neither legal nor expedient to make a church-rate for the district." The amendment was put, and lost. The original motion was then put, and carried. The defendant, Mr. Hutton, then demanded a poll in the following terms:—"We, the undersigned inhabitants of the district of St. Mary, Balham, demand a poll of the parish on the question of the amendment, 'That the opinion of this vestry is that it is neither legal nor expedient to make a church-rate for this district.' J. O. Hutton, J. Baggallay, Stanley Dent." The meeting was then adjourned until Thursday evening, the 16th of June, to receive the declaration of the poll. On that evening, the vestry having re-assembled, the chairman declared the state of the poll: "Number for the amendment and against the rate, 78 votes; number against the amendment and for the rate, 146 votes; majority for the rate, 68." The meeting was then pronounced dissolved by the chairman.

The Admiralty Advocate and *Dr. Tristram*, for the plaintiffs. Although the repairs of the stoves were estimated to cost 50*l.* during the year 1863, and only 8*l.* was expended on them, the greater part of the remaining 42*l.* was used for other legitimate expenses. Those expenses appeared in the accounts laid before the vestry in June, 1864, and were approved of. As to the charges for legal assistance, for an organist, and for collecting the rate—10*l.* salary and 5*l.* per cent. commission on the sum collected—were approved by the vestry, and were lawfully paid out of the rate. With respect to the proceedings at the vestry, the chairman could not properly put any further amendment after the poll on the original motion and amendment had been declared.

The Queen's Advocate, Dr. Deane, Q.C. and *Wills*, for the defendant. The churchwardens are bound to prove that the defendant is in fault in not paying a rate duly made in every respect. There are three objections to this rate: first, the proceedings are invalid, inasmuch as the original question was never put to the vestry after the poll on the amendment had been declared; secondly, the churchwardens, when the rate was made, ought to have had a

larger sum in hand, in which case the rate would have been unnecessary; thirdly, the estimate included certain illegal expenses —40*l.* for the organist, and the commission for collecting the rate.

DR. LUSHINGTON. Three objections have been taken to this rate, and it is truly observed by the Queen's Advocate, that it is the duty of those who set up a church-rate to allege in the libel and to prove all the facts which are requisite to its validity. But, in point of fact, the whole case resolves itself into three objections, and those objections I will now discuss and dispose of. Now, it appears upon the occasion when this rate was made that there was considerable discussion with regard to the accounts of the preceding year, and with regard to the estimate for the expenses of the succeeding year. I need only trouble myself with the latter; for with respect to the rate of the preceding year it had been disposed of, and it is not in the power of the Court to re-open the matter. A church-rate having been proposed of 3*d.* in the pound, an amendment was moved and disposed of by show of hands, upon which Mr. Hutton demanded a poll in these words: "Sir,—We, the undersigned inhabitants of the district of St. Mary, Balham, demand a poll of the inhabitants of the parish, on the question of the amendment, 'That in the opinion of this vestry it is neither legal nor expedient to make a church-rate for this district.'" Under these circumstances, the parishioners went to the poll on the 15th and 16th of June. The minutes, which are exceedingly short, set out the names of the persons present, and then state, "At adjourned meeting, held for the declaration of the poll, the chairman declared the result of the poll as follows:—the number for the amendment and against the rate, 78 votes; the number against the amendment and for the rate, 146: majority for the rate, 68." Now, it is obvious that here was a great irregularity, and the question is, whether it was such an irregularity as would vitiate the rate. The principle which the Court has always adopted, and to which I intend to adhere, is this: with regard to irregularities which do not in reality affect the true merits of the case, the Court does not expect the churchwardens to adhere to the precise course which other persons, better informed, would be required to follow. The objection is, that instead of the

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vote being put "for the amendment and against the rate," the proper course would have been, that the amendment should have been put, and after the amendment had been negatived, that then, "that the rate be now made" should also have been proposed to the meeting. This, no doubt, would have been the proper course; but, in order to save trouble, the churchwardens or their adviser blended the two questions into one; perhaps to make the matter more intelligible to the parishioners: and the vote actually was taken upon the amendment and against the rate on one side, and on behalf of the rate and against the amendment on the other. This course was open to considerable objection, because, as has been very truly argued, it might well be that those who supported the amendment, or those indeed who voted against the amendment, might have said afterwards: "We object to the rate per se upon other grounds," which they would have a right to bring forward. This was an irregularity, but will it vitiate the rate? If at this time any one had suggested a further amendment, and the chairman had refused to put it, I should have held that justice would not have been done. But as no one raised any objection, and it appears to have been the general understanding of all who were present at the meeting that the one question was, whether there should be a rate or not, I am of opinion I should not be justified in holding the rate to be bad on that ground.

There is something peculiar in the second objection which has been taken; substantially it is that the churchwardens had or might have had money in hand at the time the rate was made, and consequently that it was excessive. Now granting that no objection lay to the estimate at all, yet if the estimate amounted, say to 150*l.* or 160*l.*, yet to ask for a rate to that amount if they had a sum of 70*l.* and 80*l.* in hand, would be to demand an excessive rate. Then, in order to shew that this rate is excessive, and in order to shew that it ought not to be made according to the estimate, recourse is had to the proceedings of the former year, and it is alleged there were specific sums granted for the repairs of the stoves and other repairs for the former year which had not been expended, and which it was in the power of the churchwardens to have collected and to have made part of the resources for the year

to come. Now I think that is a principle that must not be carried too far. If the churchwardens had been actually in possession of the money certainly it would have been exceedingly wrong to demand a rate to the full extent of the estimate. Now how does the case stand? The churchwardens say: "It is very true that 50*l.* were voted, and that only 8*l.* were spent for the repairs of the stoves;" but they say with respect to the 42*l.*, that sum was expended in legal expenses. Now that being the state of the case, the question is, whether in the accounts of the preceding year, which have been examined and approved by the vestry, there are any items which the Court, notwithstanding the approbation of the vestry, can now declare to be illegal? A great deal has been said about what expenses may be incurred which may be charged upon a church-rate, and it has been argued that nothing is a legal expense except what is absolutely necessary for the repairs of the fabric and the decent performance of divine service. I have always held, and I shall continue to hold, that very much depends on the nature and description of the parish. In a place like Balham, which is in the immediate neighbourhood of London, I am of opinion that it is almost a matter of necessity that the churchwardens should be at liberty to obtain the assistance occasionally of legal advice in order that they may safely steer their course through the many difficulties in the making out of a church-rate.

As to the third objection: that there are expenses of a doubtful character in the estimate, I fully admit, but it does not appear that they were made matters (except the legal expenses which I have already disposed of) of serious dispute—the most questionable appears to be that of 40*l.* a year to the organist. When I consider them in reference to the rental of the parish, I cannot think they are of such a description as to invalidate the rate.

Looking at the whole of this case, I am of opinion that no sufficient legal objection has been taken to the rate, and I must pronounce for it, with costs.

Proctor for plaintiffs: *Ring.*

Proctors for defendant: *Clarkson, Son, & Cooper.*

END OF XXIX VICTORIA.

CASES

DETERMINED BY THE

HIGH COURT OF ADMIRALTY

AND BY THE

ECCLESIASTICAL COURTS,

FROM

MICHAELMAS TERM TO TRINITY TERM,

XXX VICTORIA.

1866
Nov. 26.

[IN THE ARCHES COURT OF CANTERBURY.]

THE OFFICE OF THE JUDGE PROMOTED BY FLAMANK AGAINST SIMPSON.

Church Discipline Act (3 & 4 *Vict. c.* 86), *ss.* 20, 23—*Admissibility of Articles —Form of Charges in Commission and Decree—Jurisdiction.*

The jurisdiction of the Court of Arches with respect to charges under the Church Discipline Act commences with the issue of the decree; the Court, not being a court of appeal, has no authority to inquire into any errors of the commissioners appointed under that act.

In a commission appointed by a bishop, under the Church Discipline Act, to inquire into charges against a clergyman, it was not directly alleged that the offences had been committed within two years then last past; but the charges were laid in the present tense, viz.: "that Mr. S. *has* lights on the communion table," &c. The commissioners overruled an objection taken to this wording of the charges, and found on evidence that there was sufficient ground for proceeding. Letters of request were then sent up to the Court of Arches. Thereupon the decree was issued, setting forth the charges in the same words as in the commission. The articles filed specified that the offences had been committed within two years.

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On objection to the admission of the articles on the ground of the words "within two years" being omitted in the commission and decree:—

Held, that the statute was satisfied, as the charges being laid in the present tense necessarily implied that the offences were offences continuing up to the time of issuing the decree.

THIS was a question as to the admissibility of the articles in a cause of office promoted by Thomas Flamank, a churchwarden of East Teignmouth, Devon, against the Rev. Thomas Burne Simpson, the perpetual curate of that parish. The cause was brought by letters of request from the Bishop of Exeter.

The question was, whether the proceedings had been instituted in accordance with the provisions of the Church Discipline Act, 3 & 4 Vict. c. 86, ss. 20, 23, it not being directly alleged, either in the commission appointed by the bishop to examine into the charges, or in the decree, that the offences had been committed within two years then last past.

The 20th section of the statute referred to, enacts that "Every suit or proceeding against any clerk for any offence against the laws ecclesiastical shall be commenced within two years after the commission of the offence in respect of which the suit or proceeding shall be instituted, and not afterwards;" and the 23rd section provides that, "No criminal suit or proceeding against any clerk for any offence against the laws ecclesiastical shall be instituted in any ecclesiastical court otherwise than is hereinbefore enacted."

The charges were in substance as follow:—

"1. That Mr. Simpson has lights on the communion-table when they are not required for the purpose of giving light.

2. That, in the administration of the holy communion, immediately before the prayer of consecration, Mr. Simpson mixes water with the wine.

3. That, after saying the prayer of consecration, Mr. Simpson raises the paten with both hands over his head, and the cup in like manner.

4. That, when the alms collected in the offertory are brought to be placed on the communion-table, Mr. Simpson places the same on a stool by the side of the table, instead of on the communion-table.

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5. That, in saying the last prayer of the morning and evening service, Mr. Simpson omits the word 'all' in the concluding sentence."

Nov. 12. *The Queen's Advocate, Dr. Deane, Q.C.,* and *Hannen,* for the defendant, in objection to the admission of the articles. This suit is founded upon the proceedings before the commissioners, as appears from the letters of request which recite them. The decree, therefore, must, and in fact does, set out the offence in accordance with the terms of the commission. From these two documents it appears that the proceedings before the commissioners were irregular, inasmuch as neither the notice to the defendant, nor the commission itself, stated what was essential to the jurisdiction, namely, that the offences had been committed within two years. So far, therefore, as the jurisdiction of this Court is dependent on the proceedings in the court below, it cannot be maintained.

Independently of those proceedings, a decree in a criminal suit must set out and properly describe an ecclesiastical offence, but such an offence is not properly described, unless there be a limitation of time, for that is of the essence of the description.

The articles must agree with the decree, and therefore a defect as to time in the decree cannot be made good in the articles: *Breeks* v. *Wolfrey* (1); *Ditcher* v. *Denison.* (2)

A. J. Stephens, Q.C., Dr. Swabey, and *Droop,* for the promoter. The introduction of a limitation as to time in the commission would have been useless and misleading, because the two years referred to in the statute is calculated from the issuing of the decree in the suit: *Bishop of Hereford* v. *T.* (3); *Ditcher* v. *Denison.* (2)

The 20th section of the 3 & 4 Vict. c. 86, is a limitation of the 11th section, and as such should be pleaded or relied on by the party accused, and need not be alleged by the promoter: *Steel* v. *Smith* (4); *Thibault* v. *Gibson.* (5) This Court is not a court of appeal from the commissioners, and any irregularity in their proceedings cannot affect the action of this Court. The report of the

(1) 1 Curt. 880.
(2) 11 Moore P. C. C. 324.
(3) 2 Rob. Ecc. 595.
(4) 1 B. & Ald. 94.
(5) 12 M. & W. 88.

commissioners is merely made for the consideration and direction of the bishop. The decree alleges an ecclesiastical offence over which primâ facie the Court has no jurisdiction. The defendant has waived the objection by appearing absolutely: he ought to have appeared under protest.

The Queen's Advocate replied.

Cur. adv. vult.

Nov. 26. DR. LUSHINGTON. I must presently advert more particularly to the facts of this case, but I deem it expedient first to state the question at issue. Truly I think there is only one: whether the defendant has been properly cited to appear in this court to the charge against him; but I shall not confine myself exclusively to this objection without considering what has been done before this court had any cognizance of the case, though I may satisfactorily come to the conclusion that those were matters with which this Court has nothing to do.

All these proceedings, call them by what name you will, are the creation of the Clergy Discipline Statute, and to that act therefore the attention of the Court must in all difficulties be directed. [His Lordship then read the sections of the statute above set out, and continued.] The question now raised, stated generally, is, whether the proceedings against the defendant have been instituted with due regard to the above sections.

Now to the facts. I state them as concisely as I can. In the summer of the present year, the Bishop of Exeter appointed, under the Church Discipline Act, a commission of inquiry to examine into certain charges brought against the defendant, the Rev. Thomas Burne Simpson, incumbent of the perpetual curacy and parish church of East Teignmouth. The commission commenced with a recital that the bishop had received the complaint of the present prosecutor charging the defendant with certain practices in the performance of divine service in the parish church as follows:—

1. That he, the said T. B. Simpson, *has* lights on the communion table; and then follow four other charges, which I need not repeat at length, but which, like the first, are laid in the present tense. The commission, however, did not directly allege that the offences

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had been committed within two years then last past. On the opening of the commission the counsel for the defendant objected that the omission of any such allegation was a bar to the prosecution of the inquiry. The commissioners, however, overruled the objection, and found upon the evidence that there was a primâ facie ground for proceedings to be instituted against the defendant, and thereupon the bishop sent up letters of request to this Court. The letters of request recite that the defendant is charged with having within the two years last past offended against the laws ecclesiastical in the following particulars, which particulars are in the same words as those used in the commission of inquiry; the charges being each laid in the present tense. Thereupon was issued the decree of this Court, drawn up in the registry and according to the form prescribed by the new rules and regulations. The decree recites the acceptance of the letters of request, enjoins pursuant to the letters of request the citation of the defendant to enter an appearance, and to answer to certain articles touching his soul's health, &c., and more especially to the following particulars as set forth in the said letters of request, namely:

1. That he *has* lights on the communion table, and the other four charges.

This and the four following charges are in identically the same words as those in the letters of request. The decree does not expressly state that the offences are alleged to have taken place within two years last past. Articles were then filed, and these specify with respect to each charge that the offence was committed within two years last past. To the admission of these articles a preliminary objection is now taken.

The first question to which the consideration of this Court has been directed arises out of the fact that the commission which authorized the commissioners to proceed does not, totidem verbis, state that the offences into which they were to inquire had been committed within two years. The commissioners, as I have stated, overruled the objection.

I am of opinion that, whether the decision of the commissioners was right or wrong, I have no authority to inquire. There is no appeal to this court, and I have no jurisdiction. It may be said that it is strange that any errors of the commission cannot be cor-

rected by some tribunal. The answer is that the statute has given no remedy in this court—why, it is not my duty to inquire, but it is probable that the commission being only a preliminary tribunal to find probable cause, it was not deemed necessary.

I dismiss from my consideration all that was done before the commissioners. I apprehend that it is quite clear by the decided cases of *Ditcher* v. *Denison* (1), *Bishop of Hereford* v. *T.* (2), that not only my jurisdiction, but the suit or proceedings to which the statute affixes the limit of two years from the commission of the offence, commences with the issue of the decree, and that I am not a court of appeal. I think, however, in justice to the commissioners, I ought to state that the charges brought before them referred to a continuing practice, and consequently in part at least to what occurred within two years. All these facts were admitted by Mr. Simpson, and witnesses proved the facts to have occurred within eighteen months. The real objection raised to the admission of these articles is to the contents of the decree citing the defendant to answer the charges. It is argued that the omission in the decree to allege in express terms that the offences had been committed within two years last past is a fatal defect, and reliance is placed upon Sir Herbert Jenner's judgment in the case of *Breeks* v. *Wolfrey* (3), which decides that in a criminal prosecution a defect in the decree cannot be made good by the articles. In that judgment I concur; but the question is, whether there is any such defect in the present decree. It seems to me that the statute was satisfied, because the charges to which by the decree the defendant was cited to answer were charges of offences which by obvious and necessary implication had been committed within two years. Each of the charges is laid in the present tense, and it is thereby necessarily implied that the offences charged were offences continuing up to the time of issuing the decree. Moreover, reference is made to the letters of request, which contain an express allegation that the charges referred to offences committed within two years past. The letters of request are filed in the registry, and constitute the foundation of the jurisdiction of the Court, and to those letters of request the defendant can always have access—they are

(1) 11 Moore P. C. C. 324. (2) 2 Rob. Ecc. 595.

(3) 1 Curt. 880.

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an indispensable part of the proceedings in the case. This being the view which I take of the case, it is unnecessary for me to consider the bearing of the case of *Thibault* v. *Gibson* (1), or whether the true construction of the statute is that the decree should state in express terms the commission within two years of the offences charged. I therefore refuse to sustain the preliminary objection raised to the admission of these articles.

The Queen's Advocate asked leave to appeal.

DR. LUSHINGTON. I do not think if the difficulty was alone to be considered there is any such difficulty as would justify me in giving leave to appeal; but I shall give leave to appeal, because if my judgment is overruled there will be an end of the case, and a discussion avoided which I cannot but view with apprehension. These cases being of a criminal character, have always been viewed with great strictness, and it is most important that if any doubt exists the course of proceeding should be defined by the highest authority.

Proctors for promoter: *Tebbs & Sons.*
Proctors for defendant: *Brooks & Dubois.*

(1) 12 M. & W. 88.

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Dec. 4.

Collision—Compulsory Pilotage—6 Geo. 4, c. 125, s. 59—Order in Council, 18th February, 1854—Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), ss. 353, 376, 379—Passenger.

The exemption from compulsory pilotage in the 59th section of the 6 Geo. 4, c. 125, does not apply to a foreign vessel without a British register.

Compulsory pilotage is not a charge upon vessels, but is a regulation instituted for their benefit.

The exemptions from compulsory pilotage contained in the order in council of the 18th of February, 1854, which, by the 353rd section of the Merchant Shipping Act, 1854, are equally in force with the exemptions in the 59th section of 6 Geo. 4, c. 125, do not apply to a foreign vessel, inward bound, not having a British register, and coming up by the North Channel.

A vessel having on board a person who did not pay for his passage, who messed with the captain, and who assisted in the work of the ship, *held* to be exempt from compulsory pilotage under the 379th section of the Merchant Shipping Act, 1854.

COLLISION. The *Hanna*, a Norwegian bark, left the port of Sundswall, in Sweden, in the month of August, 1865, bound for the port of London. On arriving off the Lemon and Ower on the 15th of September, she was boarded by a duly licensed Trinity pilot, who took charge of her to pilot her to London by the North Channel. In passing up the river Thames, a little above the Nore Light Ship, and whilst in charge of the pilot, she came into collision with the *Britannia*.

At the time of the collision, the *Hanna* had on board a man described as a passenger, respecting whom the master gave the following evidence: "That his name was Holbein; that he knew his friends in Sweden, so he promised to take him across, and he was to do what he could; he did not pay any passage money; he did not do much, he did what he could; he had not been a proper sailor; he did not understand much about the sea; he messed in the cabin; the steward waited on him, but there was not much waiting."

The cause was heard on the 16th of November, 1866, when the Court found that the pilot of the *Hanna* was to blame for the collision.

On a subsequent day (23rd November) the question was argued

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whether, in these circumstances, the owners of the *Hanna* were liable in the damages.

The river Thames is within the London district as defined by the 370th section of the Merchant Shipping Act, 1854, and is within the limits of the Trinity House authority.

The following are the principal enactments referred to in the argument and judgment:—

6 Geo. 4, c. 125, s. 59: "Provided always, and be it further enacted, that for and notwithstanding anything in this act contained, the master of any collier or of any ship or vessel trading to Norway, or to the Cattegat, or Baltic, or round the North Cape, or into the White Sea, on their inward or outward voyages, or of any constant trader inwards from the ports between Boulogne inclusive and the Baltic (all such ships and vessels having British registers, and coming up either [*sic*] by the North Channel but not otherwise), or of any Irish trader using the navigation of the rivers Thames or Medway, or of any ship or vessel employed in the regular coasting trade of the kingdom, or of any ship or vessel wholly laden with stone from Guernsey, Jersey, Alderney, Sark, or Man, and being the production thereof, or of any ship or vessel not exceeding the burthen of sixty tons British register, except as hereinafter provided, or of any other ship or vessel whatever, whilst the same is within the limits of the port or place in relation to which particular provision hath heretofore been made by any act or acts of parliament, or by any charter or charters for the appointment of pilots, shall, and may lawfully, and without being subject to any of the penalties by this act imposed, conduct or pilot his own ship, when and so long as he shall conduct or pilot the same without the aid or assistance of any unlicensed pilot or other person or persons than the ordinary crew of the said ship or vessel."

Order in Council, 18th of February, 1854.—Regulation for the extension of the exemptions from compulsory pilotage now existing under the provisions of the 59th section of the act 6 Geo. 4, c. 125. Approved by order of Her Majesty in Council, dated 18th of February, 1854:

"The masters of the undermentioned ships and vessels shall, subject to the provision contained in the 59th section of the act of parliament 6th Geo. 4, c. 125, in respect of the employment

of unlicensed persons, be exempted from compulsory pilotage, viz.:

"Of ships and vessels trading to Norway, or to the Cattegat, or Baltic, or round the North Cape, or into the White Sea, when coming up by the South Channels:

"Of ships and vessels trading to ports between Boulogne (inclusive) and the Baltic on their outward passages, and when coming up by the South Passages:

"Of ships and vessels passing through the limits of any pilotage district on their voyages from one port to another port, and not being bound to any port or place within such limits, nor anchoring therein."

Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104).—Compulsory Pilotage (General).

Section 353. "Subject to any alteration to be made by any pilotage authority, in pursuance of the power hereinbefore in that behalf given, the employment of pilots shall continue to be compulsory in all districts in which the same was by law compulsory immediately before the time when this act comes into operation; and all exemptions from compulsory pilotage then existing within such districts shall also continue in force; and any master of any unexempted ship navigating within any such district, who, after a qualified pilot has offered to take charge of such ship, or has made a signal for that purpose, either himself pilots such ship without possessing a pilotage certificate enabling him so to do, or employs or continues to employ an unqualified person to pilot her, and every master of any exempted ship navigating within any such district, who, after a qualified pilot has offered to take charge of such ship, or has made a signal for that purpose, employs or continues to employ an unqualified pilot to pilot her, shall for every such offence incur a penalty of double the amount of pilotage demandable for the conduct of such ship."

Compulsory Pilotage (Trinity House).

Section 376. "Subject to any alteration to be made by the Trinity House and to the exemptions hereinafter contained, the pilotage districts of the Trinity House, within which the employment of pilots is compulsory, are the London district and the

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Trinity House outport districts, as hereinbefore defined; and the master of every ship navigating within any part of such district or districts, who, after a qualified pilot has offered to take charge of such ship, or has made a signal for that purpose, either himself pilots such ship without possessing a certificate enabling him so to do, or employs or continues to employ an unqualified person to pilot her, shall for every such offence in addition to the penalty hereinbefore specified, if the Trinity House certify in writing, under their common seal, that the prosecutor is to be at liberty to proceed for the recovery of such additional penalty, incur an additional penalty, not exceeding five pounds, for every fifty tons burden of such ship."

Section 379. "The following ships, when not carrying passengers, shall be exempt from compulsory pilotage in the London district and in the Trinity House outport districts; (that is to say,)

(1) Ships employed in the coasting trade of the United Kingdom:

(2) Ships of not more than sixty tons burden:

(3) Ships trading to Boulogne or to any place in Europe north of Boulogne:

(4) Ships from Guernsey, Jersey, Alderney, Sark, or Man, which are wholly laden with stone, being the produce of those islands:

(5) Ships navigating within the limits of the port to which they belong:

(6) Ships passing through the limits of any pilotage district on their voyages between two places, both situate out of such limits, and not being bound to any place within such limits, nor anchoring therein."

A convention of commerce and navigation entered into between Great Britain and Sweden, dated 18th of March, 1826 (Hertslet's Commercial Treaties, vol. 3, p. 433), was also referred to, and is commented on in the judgment.

Brett, Q.C. (*E. C. Clarkson* with him), for the owners of the *Hanna*. By the 354th section of the Merchant Shipping Act, vessels having passengers on board must employ a pilot. As this vessel had a passenger on board, and was within the London dis-

trict, she was not exempt within the terms of the 379th section. If the person on board was a passenger, this ship was not within that exemption, and therefore pilotage was compulsory: *The Earl of Auckland.* (1) The exemptions in the 59th section of the 6 Geo. 4, c. 125, which are extended by the order in council of the 18th of February, 1854, apply to vessels having British registers.

This ship was a foreign ship, not having a British register, and was therefore not within that exemption: *The Temora.* (2)

Dr. Deane, Q.C., and *Vernon Lushington,* for the plaintiffs. Under the 59th section of 6 Geo. 4, c. 125, it was necessary that the ship should have a British register, and should come up by the North Channel. That section being imperfect, the order in council of February, 1854, extended the exemption to the South Passage and to all vessels having British registers or not, provided they were within a particular navigation. There is a clear exemption under that order, on which the true construction was put in *The Earl of Auckland.* (3)

A passenger is defined in s. 303 of the Merchant Shipping Act as any person other than the master and crew, and the owner, his family, and servants. Looking at the evidence respecting this person, can it be said that a person so taken on board was a passenger in any sense of the word? A passenger must be a person who in some sense or other is on board in connexion with the owner. The owner knew nothing of this person being on board; the master took him on board from kindness, and brought him to England. The mere fact of one of the crew taking a friend on board cannot impose compulsory pilotage on the owner. A passenger must be a person taken on board with the consent of the owner, and whose name appears on the books, and not a man who works his passage. This man was, in fact, a seaman—Passengers Act, 18 & 19 Vict. c. 119, s. 3. He did not pay money; he received no money, but did work and received food; he was, therefore, a seaman.

Brett, Q.C., in reply. This person was a passenger. Compulsory pilotage is for the preservation of life, and it cannot be argued that, if persons are not on board with the consent of the owner,

(1) Lush. 164. (2) Lush. 17. (3) Lush. 177.

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their lives are not to be preserved. It is not clear that the master had not a general authority to take passengers; he was not bound to treat this person as a seaman.

The 376th section imposes compulsory pilotage; the 379th section does not take away the compulsion, if there be a passenger on board. This ship was within the Trinity House district. The London district, as defined by s. 370, is a Trinity House district, and by s. 376 pilotage is compulsory unless exempted by s. 379, which is not the case here.

Cur. adv. vult.

Dec. 4. DR. LUSHINGTON delivered judgment. The question before the Court is, whether pilotage was compulsory. The burden of proof lies upon the defendants, the owners of the *Hanna*. They rely upon the positive enactment of the 376th section of the Merchant Shipping Act, which is in these terms: "Subject to any alteration to be made by the Trinity House, and to the exemptions hereinafter contained, the pilotage districts of the Trinity House within which the employment of pilots is compulsory are the London district, and the Trinity House outport districts as hereinbefore defined"—this includes the district where the collision between the *Hanna* and the *Britannia* took place—"and the master of every ship navigating within any part of such districts, who, after a qualified pilot has offered to take charge of such ship, either himself pilots such ship without possessing a certificate enabling him so to do, shall for every such offence incur a penalty," &c. From the effect, however, of this enactment the plaintiffs contend that the *Hanna* was exempted, and they specify two classes of exemptions, either of which they allege is sufficient—the one, exemptions subsisting before the passing of the Merchant Shipping Act, and retained by that act; the other, exemptions created for the first time by the Merchant Shipping Act. To take the former class first: the 353rd section of the Merchant Shipping Act (Part V. Compulsory Pilotage General) provides that all exemptions from compulsory pilotage existing at the time when the Merchant Shipping Act came into operation shall continue in force; and by the 59th section of the 6 Geo. 4, c. 125, it was enacted that "the master of any vessel trading to Norway, or to the Cattegat, or Baltic,

or round the North Cape, or into the White Sea, on their inward or outward voyages, *or of any constant trader inwards between Boulogne (inclusive) and the Baltic* (all such ships and vessels having British registers and coming up either by the North Channel, but not otherwise), might lawfully, without being subject to any of the penalties by this act imposed, pilot his own vessel so long as he should pilot the same without the aid of any unlicensed pilot." Now that the exemptions contained in the above section of 6 Geo. 4, c. 125, were retained by the 353rd section of the Merchant Shipping Act, is a point which has been decided by the Court of Queen's Bench in *Reg.* v. *Stanton* (1), and by the Judicial Committee in the case of *The Earl of Auckland.* (2)

The authority of the Queen's Bench in the construction of a statute, and of the Judicial Committee in all matters, I am bound to obey. The question then is, whether the exemption of the 59th section of 6 Geo. 4, c. 125, applies to the *Hanna?* Looking within the four corners of the section, I am satisfied that the section does not apply, because the exemption is subject to the condition that the vessel should have a British register, and the *Hanna* is a Norwegian vessel without a British register. But the plaintiffs would escape from this difficulty by invoking a convention of commerce and navigation made between this country and Sweden in March, 1826; that is to say, a few months before the passing of the 6 Geo. 4, c. 125. The 2nd section of the convention is as follows: "British vessels entering or departing from the ports of the kingdoms of Sweden and Norway, and Swedish and Norwegian vessels entering or departing from the ports of the United Kingdom of Great Britain and Ireland, shall not be subject to any other or higher ship duties or *charges* than are or shall be levied on national vessels entering or departing from such ports respectively."

The plaintiffs contended that compulsory pilotage was a charge within the meaning of the above section of the convention, and consequently that, notwithstanding anything in the 59th section of 6 Geo. 4, c. 125, Norwegian vessels could not be subject to compulsory pilotage where British vessels were exempt. This view, however, seems to me untenable; the theory of the legisla-

(1) 8 Ell. & Bl. 445. (2) Lush. 164, 387.

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ture, whether right or wrong, must be taken to be that compulsory pilotage is not a charge upon vessels, but rather a regulation instituted for their benefit. Moreover, if the construction of the plaintiffs were correct, the condition annexed in the 59th section of 6 Geo. 4, c. 125, that vessels to be exempted should have a British register, would be null and void, not only in the case of Norwegian vessels, but also in the case of vessels of the numerous countries with which Great Britain has a similar convention of navigation and commerce. I need not refer to the 3rd section of the same convention with Sweden; it simply prescribes free reciprocity of navigation in respect of exports and imports. It has, in my opinion, no bearing upon the present case.

The plaintiffs then called the attention of the Court to the extension which the exemptions of the 59th section of 6 Geo. 4, c. 125, received from the order in council of the 18th of February, 1854, a few months before the passing of the Merchant Shipping Act; and pointed out that in that order the condition that vessels to be exempted should have a British register is wanting. That order is in the following terms: "The masters of the undermentioned ships and vessels shall, subject to the provision contained in the 59th section of 6 Geo. 4, c. 125, in respect of the employment of unlicensed persons, be exempted from compulsory pilotage, viz.:

"Of ships or vessels trading to Norway, or to the Cattegat, or Baltic, or round the North Cape, or into the White Sea, when coming up by the *South* Channels.

"Of ships and vessels trading to ports between Boulogne (inclusive) and the Baltic on their outward passages, and when coming up by the *South* Passages," &c.

Now this order in council (the exemptions contained in which are by virtue of the 353rd section of the Merchant Shipping Act, as interpreted by the decision in *The Earl of Auckland* (1), equally in force with the exemptions contained in the 59th section of 6 Geo. 4, c. 125) does not directly apply to the *Hanna*. For the *Hanna*, at the time of the collision, was upon her inward passage, and coming up by the *North* Channel. But it was argued that the order in council having exempted vessels coming up from the

(1) Lush, 164, 387.

Baltic by the South Channel, without rendering it necessary for them to have a British register, it would be an anomaly to hold that, by virtue of the statute, the same vessels, when coming up by the North Channel, should not be exempt because they had no British register. To this argument I cannot accede. It would be easier for the Court to acquiesce in such an anomaly, or to hold that the condition of a British register, as expressed in the statute, was understood in the order of council extending the exemption of that statute, than to hold that an express provision of a statute had been thus tacitly repealed by implication in an order of council made in pursuance of the statute. It was also argued that any distinction in the matter of exemptions from compulsory pilotage between British vessels and foreign vessels is an irrational distinction—neither class being necessarily more or less in need of a pilot from the greater or less familiarity of the master with the waters within which the pilotage is compulsory—and a distinction which has been superseded by the sensible distinction adopted in the Merchant Shipping Act, between vessels navigating in the waters of the port to which they belong and vessels navigating in other waters. I admit the force of this argument, but it cannot weigh against the express words of the statute 6 Geo. 4, c. 125, s. 59, requiring a British register. Any anomalies that may thus arise are due to the Merchant Shipping Act retaining, or having been interpreted to retain, exemptions previously existing under another system. Lastly, I consider the case cited of the *Temora* (1) to be inapplicable. I come, then, to the conclusion that the *Hanna* was not exempted from compulsory pilotage by the 59th section of 6 Geo. 4, c. 125, either taken alone or in connexion with the convention with Sweden of 1826, or of the order in council of the 18th of February, 1854.

I now pass to the other class of exemptions on which the plaintiffs relied, viz. that instituted by the 379th section of the Merchant Shipping Act itself, which provides (inter cetera) that ships trading to any place in Europe, north of Boulogne, *when not carrying passengers*, shall be exempt from compulsory pilotage in the London districts, and in the Trinity House outport district.

This exemption clearly applies to the *Hanna*, provided she was

(1) Lush. 17.

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not carrying passengers. The question, then, is reduced to this: whether she was carrying passengers. There was only one person on board on whom that character is attempted to be fixed. I will assume that, to satisfy the statute, it is not necessary that there should be more than one passenger. By the 4th section of the 13 & 14 Vict. c. 21 (the act for shortening the language used in acts of parliament) the plural is to be deemed to include the singular, unless the contrary is expressly provided, and in this statute there is no express provision to the contrary. But the question is, whether the person on board, alleged to be a passenger, is in the eye of the law a passenger. It appears that the man did not pay for his passage; that the master, being acquainted with his friends in Sweden, agreed to give him a passage to London gratuitously, on the understanding that the man, who had been to sea before, should do what he could to assist in the work of the ship; it also appears that the man, whilst on board, messed in the cabin with the master. Now, the term "passenger" is not defined in the Merchant Shipping Act, except in the 303rd section, where the definition is given only for specified purposes, viz. for the purposes of the provisions in the act with respect to surveys and certificates of passenger *steam* ships. As so defined, the term includes any person carried in a *steam* ship, other than the master and crew, and the owner and his family and servants. The word seaman is defined by the interpretation clause of the Merchant Shipping Act, and includes "every person (except masters, pilots, and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship." Upon the whole, I am satisfied that the person in question was not a passenger. In fact, he was a nondescript. In one respect he was a seaman, because, as he helped to work his passage, he might be said to have been employed or engaged in some capacity on board ship. On the other hand, as being a friend of, and messing with, the master, without making any payment, he might seem to belong to the category of the family or servants of the master. But, in any case, he was not a passenger within the meaning of the statute.

The result then is, that, in my opinion, the *Hanna* was, under the 379th section of the Merchant Shipping Act, exempted from

compulsory pilotage, and, consequently, her owners are responsible for the damage she occasioned by her collision with the *Britannia* I shall refer it to the registrar and merchants to estimate the damages in the usual manner, and I condemn the owners of the *Hanna* in the amount, together with the costs of the suit.

Proctors for plaintiffs: *Rothery & Co.*
Proctors for defendants: *Deacon, Son, & Rogers.*

THE SOBLOMSTEN.

Dec. 11.

Freight pro ratâ itineris—Reasonable time to Re-ship and Tranship—Abandonment—Proceeds of Sale of Cargo—Claims for pro ratâ Freight, Costs, Disbursements.

Where a vessel is disabled at an intermediate port, the master is allowed a reasonable time to re-ship and tranship, so as to earn his freight.

The whole freight is payable, if by default of the owner of the cargo, the master is prevented forwarding the cargo from an intermediate port to its destination.

No freight is payable if the owner of the cargo is compelled against his will to take the cargo at an intermediate port.

To sustain a claim for pro ratâ freight, there must be such a voluntary acceptance of the goods by their owner at an intermediate port, as to raise a fair inference that further carriage of the goods was dispensed with.

A vessel was chartered at a port in Sweden to carry a cargo of deals to Bordeaux, freight being payable on delivery. She became disabled, and on the 2nd of October, 1865, was towed by three smacks into an English port; a salvage suit was instituted (7th October), and the vessel was arrested by order of the Court. The master employed shipbrokers at the port as agents for the owners of the vessel; and through the agent for the Norwegian Lloyds' Association, instructed proctors to enter an appearance in the salvage suit for the owners of the ship and the cargo. Notice was sent by the agents and by the proctors to the owners of the cargo, informing them of the condition of the ship, and that the cargo would be sold, but no instructions were received from them. The cargo was discharged, and the vessel being found not worth repairing, the master and crew (24th October) abandoned her. The cargo was sold (16th December) by order of this Court, and out of the proceeds a sum was awarded to the salvors. The ship had been abandoned to the proprietors of the graving dock.

On a motion by the owners of the vessel for payment of freight pro ratâ out of the balance remaining in the registry:

Held, that the owners of the cargo having had notice that their cargo would be sold, had waived their right to have their cargo carried to Bordeaux, and thereby impliedly promised to pay a pro ratâ freight;

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That the proctor's costs were the first charge upon the fund in court;

That the agents employed at the port were entitled to such part of their charges as consisted of necessaries supplied to the ship, but not to such disbursements as were in the nature of general average expenses;

The Court directed, first, that the proctors be paid their costs; secondly, the agents their charges for necessaries; and, thirdly, the owners of the vessel their pro ratâ freight, less the claim of the agents for necessaries.

THIS was a motion on behalf of the owners of the late barque *Soblomsten* for payment to them of freight, pro ratâ itineris, out of the proceeds of the sale of the cargo. The circumstances were as follows:—

In the month of June, 1865, Hector Vergez and T. Camentron, timber merchants at Bordeaux, contracted to purchase certain timber from Messrs. Bergman, Hummell, and Co., of Neder Calix, in Sweden. For the purpose of fulfilling their contract, Messrs. Bergman chartered from her owners the *Soblomsten*, a Norwegian vessel, and in the month of August, at Neder Calix, shipped the deals on board for Bordeaux, the freight per tale being payable on delivery. Bills of lading were given to Messrs. Bergman, and by them duly endorsed for value to Vergez and Co., who, it was not disputed, were the owners of the cargo. On the 2nd of October the vessel, in the course of her voyage to Bordeaux, struck on the Ower Sand in the North Sea, and was towed up by three English fishing smacks into the port of Great Grimsby in a disabled condition. On the 7th of October a salvage suit was instituted by the plaintiffs against the *Soblomsten*, her freight and cargo, and the vessel and cargo were arrested under order of this Court. The Master at Great Grimsby employed Messrs. Donner, Stewini, & Co., shipbrokers, of that port, as agents for the owners of the vessel, and to transact all that was necessary under the circumstances for the vessel and cargo. He also summoned from Yarmouth Mr. Butcher, agent in this kingdom for the Norwegian Lloyds' Assurance Association, and Mr. Butcher, for the benefit of all concerned, instructed Messrs. Deacon & Co., the proctors, to enter an appearance in the case on behalf of the owners of the ship, and also of the owners of the cargo. Shortly afterwards, having made a survey of the vessel, Mr. Butcher instructed Messrs. Deacon & Co. to write to Messrs. Vergez, the owners of the cargo, to inform them of the condition of both the ship

and cargo, and to obtain their instructions as to the cargo. Meantime, the cargo was discharged at Great Grimsby; the *Soblomsten* was put into the graving dock, and surveyed on behalf of the owners and underwriters, and the result was that she was found not worth repairing. Accordingly, on the 24th of October, the master and crew abandoned her, and the master gave notice of such abandonment to the proprietors of the graving dock.

On the 14th of November, the Court, on the application of the plaintiffs, directed both vessel and cargo to be sold, but, at the instance of Messrs. Deacon & Co., suspended the issue of the commission for three days. This delay was asked for, in order that the owners of the cargo or their agents might be communicated with. It appeared that, though Messrs. Donner & Co. had written several times to the Norwegian consul at Bordeaux to procure instructions from the owners of the cargo, no instructions had been received. Messrs. Donner & Co. then telegraphed to the Norwegian consul at Bordeaux, informing him that the ship and cargo would be sold by the Court, unless bail was given, and begging him to telegraph instructions. No instructions, however, appear to have come, and Messrs. Donner & Co. declined on their own responsibility to find bail for the cargo. The cargo was accordingly sold on the 16th of December. The vessel was also put up for sale, but found no purchaser, and thereupon the salvors abandoned her to the proprietors of the graving dock, the dock dues not having been paid.

On the 6th of March, 1866, the cause came on for hearing, and the Court awarded to the salvors 300*l.* for their services, and directed that sum, together with the costs, to be paid out of the proceeds of the sale of the cargo. This had been done.

Vernon Lushington, in support of the motion. The question now arises, whether the owners of the vessel are entitled to freight pro ratâ itineris: The *Cargo ex Galam* (1); *Blasco* v. *Fletcher* (2); *Vlierboom* v. *Chapman.* (3) The owners are entitled to pro ratâ freight for the benefit to the cargo, in taking it from Sweden to this country. The master had nothing to do with the sale of the cargo.

(1) Brow. & Lush. 167. (2) 14 C. B. (N.S.) 147, 178; 9 Jur. 955 105.

(3) 13 M. & W. 230.

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The shipowners had a lien for the freight that would be due for carrying the cargo to destination. When the Court dispossesses the person having the lien of the property over which that lien existed, it will protect his interests.

Cohen asked for the costs of Messrs. Deacon, Son, & Rogers, who had entered an appearance in the salvage suit, on behalf of the owners of the vessel. The master of the ship has authority in moments of emergency to do the best for the cargo, and, if necessary, to appoint a solicitor to protect the interests of the cargo: *The Gratitudine.* (1) Moreover, there is no reason why the owners of the cargo should receive the benefit of the services of Messrs. Deacon & Rogers without paying for them; "qui sentit commodum, sentire debet et onus."

E. C. Clarkson, for the owners of the cargo, opposed the motion, and asked that the proceeds of the sale be paid to Messrs. Vergez & Co., the owners of the cargo. To sustain a claim to pro ratâ freight, the owners of the *Soblomsten* must rely on a fresh contract, express or implied. It is not suggested that there was any express contract to pay pro ratâ freight. There has not been any acceptance of the cargo by its owners under circumstances to raise an inference that they dispensed with the further carriage of the goods. The owners of the cargo never accepted delivery of it at all. They had a right to hold the owners of the ship to their contract to carry the goods to their port of destination, or otherwise to lose all claim to freight, and this they practically did. Finding that the ship had broken down, and that there was a claim on their cargo for salvage, they simply abstained from all interference, and their cargo was sold at the instance of the salvors by the order of this Court, and the proceeds have been brought into Court. The law with regard to pro ratâ freight is clearly stated in Maclachlan on Shipping, pp. 406, 407.

Lushington, in reply. There must be an abandonment of the voyage. The master, though he abandoned the ship, never abandoned the voyage. There is no difference in applying for cargo or applying for proceeds. The law implies that where the owner of the cargo applies for proceeds, he ought to pay pro ratâ freight. As to the notice to the owner of the cargo, he had notice in fact as

(1) 3 C. Rob. 240.

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well as notice in law, and was a consenting party to the cargo being sold.

He then moved that a sum of 116*l.* 16*s.* 6*d.* be paid to Messrs. Donner, Stewini, & Co., the ship-agents at Great Grimsby, for their disbursements for the benefit of the cargo, and other expenses: *Scaife* v. *Tobin.* (1) As the master has a lien on the cargo for expenses in the nature of general average, the money may be paid to the ship-agent.

E. C. Clarkson, contrà.

Cur. adv. vult.

Dec. 11. DR. LUSHINGTON gave judgment:

[After stating the facts as above.] The defendants, Messrs. Vergez & Camentron, the late owners of the cargo, now claim to have paid to them the balance remaining in the registry. Other claims, however, are made on this same balance by the owners of the *Soblomsten*, by Messrs. Donner & Co., and by Messrs. Deacon & Co. The claim by the owners of the *Soblomsten* is a motion for the payment of pro ratâ freight for the carriage of the cargo as far as Great Grimsby. The defendants, Messrs. Vergez & Co., deny that any freight has been earned.

For the decision of this question, it will not be necessary for me to consider at length the various cases to which I was referred. It has not been argued that in this respect the Norwegian law differs from British law; and by British law the following points seem to me settled:

First, that upon the vessel becoming disabled at an intermediate port, the master is allowed a reasonable time within which to re-ship or tranship, so as to earn his freight.

Second, that the *whole* freight is payable, if by default of the owner of cargo the master is prevented from forwarding the cargo from the intermediate port to its destination: *Cargo ex Galam.* (2)

Third, that *no* freight is payable, if the owner of cargo against his will is compelled to take the cargo at an intermediate port.

Fourth, that to justify a claim for pro ratâ freight there must be a voluntary acceptance of the goods by their owner at an intermediate port in such a mode as to raise a fair inference that the

1 Q.B.D. 632, 634

(1) 3 B. & Ald. 524. (2) Brow. & Lush. 167.

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further carriage of the goods was intentionally dispensed with: *Vlierboom* v. *Chapman*. (1)

Now as to the facts. It is clear that the interval between October 2nd, the date of the disabling of the vessel, and October 7th, the date of her arrest, does not constitute such a reasonable time as that within which the master would be bound, under pain of forfeiture of the entire freight, to exercise his option of reshipping or transhipping the cargo. Pending the arrest of the cargo, any exercise of his option would be necessarily inoperative. Consequently, the abandonment by him of his vessel on October 24th was immaterial to the cargo, because the cargo was still under arrest, but, under any circumstances, an abandonment by the master of his vessel could not of itself be taken to be a repudiation by him of his contract to forward the goods to their destination, for, of course, there would remain the other alternative of transhipping the goods, or forwarding them in another vessel. Then it was no part of the duty of the master or the owners of the vessel, especially after the owners of the cargo were apprized of the circumstances, to procure the release of the cargo from arrest. This was for the owners of the cargo to do for themselves, and, upon their doing it, the obligation would have been renewed upon the master to forward the cargo to its destination under pain of forfeiting freight. The owners of the cargo, however, did *not* procure the release of the cargo. They must be taken to have had notice that their cargo was about to be sold by order of the Court. Indeed, I have no doubt they had notice. Then it is proved that Messrs. Donner did repeatedly endeavour to communicate to them such notice through the Norwegian consul at Bordeaux; and Mr. Vergez in his affidavit does not allege that his firm did not receive notice. I shall, therefore, hold that Messrs. Vergez & Camentron had notice that their cargo would be sold if not bailed; that they suffered it to be sold; and that they must bear the consequences of their own laches. What, then, are those consequences? It might possibly be argued that the conduct of the owners of the cargo in not bailing the cargo, but allowing it to be sold, prevented the master from fulfilling his contract to carry the goods to their destination, and so earning his full freight. But freight pro ratâ

(1) 13 M. & W. 238.

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is all which is asked by this motion; and I think that the conduct of the owners of the cargo amounts to a waiver by them to have their cargo carried from Great Grimsby to Bordeaux, and does raise an implied promise that they would pay a pro ratâ freight. In ascertaining, however, this pro ratâ freight, two considerations must be borne in mind: first, the freight which the owners of the vessel have already received by way of advance from Messrs. Bergman at Neder Calix must be taken into account; secondly, there must be a deduction on account of salvage. The salvage award and the costs of the suit previous to this motion, which are a charge upon freight as well as cargo, have been defrayed exclusively out of the cargo. The freight now allowed must contribute its proportionate share, which must be recouped to the cargo.

The other claimants against the fund are Messrs. Deacon & Co., for their costs, and Messrs. Donner & Co., the shipbrokers, for their disbursements. Messrs. Deacon were originally instructed by Mr. Butcher to enter an appearance on behalf of owners of cargo as well as of owners of the vessel; and they defended the salvage suit from its institution until the month of December in last year, when Mr. Butcher, finding that, notwithstanding his frequent communications, he could receive no positive instructions from the owners of the cargo, instructed Messrs. Deacon not to incur any further expense. Messrs. Donner, Stewini, & Co. were employed by the master upon the arrival of the ship at Great Grimsby to act as agents for the ship, and to transact what was necessary to be done both for ship and cargo. They were not parties to this suit until November of this year, when an appearance was entered on their behalf, with a view that they might make the present motion to have their disbursements paid to them out of the proceeds of the cargo. The owners of the cargo now repudiate both Messrs. Deacon and Messrs. Donner, and deny that they ever employed them or authorized them to be employed. In my opinion, however (and for this the judgment of Lord Stowell in the *Gratitudine* (1) is a direct authority), the master in the first instance was plainly justified by his position in appointing Messrs. Donner to act as agents for the cargo as well as for the ship, and in giving instructions (through Mr. Butcher) to Messrs. Deacon to appear for the owners of

(1) 3 C. Rob. 259.

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the cargo in the salvage suit. Of course it was open for the owners of the cargo to revoke each of these appointments, but of this there is no trace until October in the present year. They now swear that the only persons authorized by them were Mr. Veale, a solicitor, and Messrs. Oates, ship-agents at Great Grimsby. But they omit to say when they first so authorized them. Mr. Veale was no other than solicitor to the salvors, and Messrs. Oates were the brokers employed by the marshal of the Court to sell the cargo. Each of these persons, therefore, must necessarily have been from the first conversant with the proceedings of Messrs. Deacon and Messrs. Donner with respect to the cargo, and if really authorized by Messrs. Vergez might have stopped any further interference with the cargo. But the first intimation of this kind was made in October of the present year to Mr. Butcher, who immediately directed Messrs. Deacon to withdraw the appearance for the owners of cargo. I think, therefore, that the owners of cargo cannot be heard to say that either Messrs. Deacon or Messrs. Donner were not justified in acting for the cargo.

This being so, I proceed to consider whether the Court can order payment of their claims out of the fund in court. The case of Messrs. Deacon is simple. Proctors in this court have the same lien as attorneys, as I have held before in the case of the *Araminta* (1), and in my opinion their costs are the first charge on the fund now in court.

With regard to the claim of Messrs. Donner, Stewini, & Co., the ship-agents of Great Grimsby, there is greater difficulty. Not that I see reason to think the disbursements now claimed for are not disbursements properly made. But the question is, whether the Court can admit these claims to be paid out of the proceeds now in the registry. The bill of Messrs. Donner, Stewini, & Co., seems to be made up partly of charges for necessaries supplied to the ship, and partly of charges which would come under the head of general average expenses. With regard to the necessaries, Messrs. Donner, Stewini, & Co., would, under the 3 & 4 Vict. c. 65, have a right of action against the ship, and though they have not formally instituted such an action, yet as they have appeared in this salvage suit, I think the Court will be justified in directing so

(1) Swabey, 81.

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much of their claim as is made for necessaries to be satisfied out of the sum awarded to the owners of the vessel as their pro ratâ freight. With regard to general average expenses the case is different. These are attributable to ship, freight, and cargo, in proportion, and the master has a possessory lien upon the cargo to satisfy the proportion of the general average expenses due from the cargo. But the ship-agent, by whom these expenses may in the first instance have been incurred, has for those expenses no lien upon ship, freight, or cargo, nor has he even a right of action in rem against any of them. The Court, therefore, cannot direct, (however just such a course might be), that any portion of the proceeds now in court, whether the portion to be assigned to the owners of the vessel as for pro ratâ freight, or the portion (if any) to which the owners of the cargo are entitled, should be paid over to Messrs. Donner, Stewini, & Co., in discharge of such of their disbursements as are in the nature of general average expenses.

The result then is, that I refer it to the registrar and merchants to ascertain the amount of pro ratâ freight in manner before mentioned, and to ascertain what portion of Messrs. Donner's charges may be considered as charges for necessaries supplied to the ship. Then the fund in court will be applied in making the following payments in the following order:

1. To Messrs. Deacon their costs.

2. To Messrs. Donner their charges for necessaries.

3. To the owners of the vessel their pro ratâ freight, less the claim of Messrs. Donner for necessaries.

The residue will belong to the owner of the cargo, subject to the lien of the owner of the vessel, for the share of the general average expenses due from the cargo, which lien the Court, according to the judgment in the *Cargo ex Galam* (1), is bound to regard. In the present stage, I think it advisable to make no order as to this residue.

After the registrar has made his report, and the foregoing payments have been made, the owners of the vessel and the owners of the cargo may move the Court again.

Each party must bear his own costs of these motions, except

(1) Brow. & Lush. 181.

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Messrs. Deacon, who may add their costs to the amount of their claim.

Proctors for plaintiffs in salvage suit, and for owners of cargo: *Clarkson, Son, & Cooper.*

Proctors for owners of vessel in salvage suit: *Deacon, Son, & Rogers.*

Proctor for owners of vessel, and for Donner, Stewini, & Co.: *Coote.*

THE TROUBADOUR.

Nov. 27.

Necessaries—Mortgagee—Pleading.

A reply in a cause of necessaries, leaving it doubtful whether the person in possession of the vessel at the time of the supply was the original mortgagee or the defendant, the transferree of the mortgage, is bad.

A mortgagee in possession would not be liable for necessaries supplied, unless the master in ordering them acted as the agent of the mortgagee.

An allegation that a defendant was in possession of the vessel at the date of the supplies, and personally liable for them, would not be a good reply to an answer of a defendant claiming to be a mortgagee prior to the date of the supply.

3 Ec 272
3 W. R. 351-3,
356, 360,
4 P.C. 166-9

THIS was a motion to reject the second article of the plaintiff's reply.

The cause was a cause of necessaries instituted against the *Troubadour*, a vessel belonging to the port of Wexford, in respect of necessaries supplied to her at different times between June, 1865, and March, 1866, whilst lying in the port of Liverpool. The petition simply alleged that the necessaries were supplied upon the order of the master. The defendant, Edward Ferdinand Sichel, having entered an appearance as first mortgagee, filed an answer to the following effect:—

That in the month of April, 1863, the vessel was mortgaged to one Gustav Sichel. That on the 2nd of December, 1864, the mortgage was assigned to, and vested in, the defendant Edward F. Sichel. That the necessaries were ordered by Gustav Sichel, or his agent, solely on the personal credit of Gustav Sichel, and not on the credit of the defendant, or of the owners of the vessel; and the answer closed with an allegation that even if all the averments of the petition were true, yet that the defendant's claim as

transferree of the mortgage would have priority over the claim of the plaintiffs for the necessaries supplied.

The second article of the reply, the admission of which was now objected to, simply repeated the allegation that the necessaries were supplied on the order of the master, and that at the time, "the persons entitled as mortgagees, under the mortgage set forth in the first article of the said answer, to the principal money and interest thereby secured, had entered into and were in possession as such mortgagees; and that the vessel thenceforth, until after the institution of the suit, remained in the possession of the persons from time to time entitled to the principal and interest secured by the said mortgage as mortgagees in possession of the said ship, and therefore the plaintiffs are entitled in priority over the claim of the defendants as mortgagees of the said ship."

Nov. 13. *Cohen*, in support of the motion. The question is whether a mortgagee has priority over a person who supplies necessaries to a British ship: *The Pacific*. (1) At the time these supplies were furnished the plaintiffs acquired a lien on the ship, but subject to the mortgage. The only difference between this case and the *Pacific* (1) is, that the mortgagees were in possession at the time the necessaries were supplied, but there is nothing to shew that they expressly or impliedly promised to pay for the necessaries.

E. C. Clarkson, contrà, referred to the *Perla*. (2) The necessaries were supplied while the mortgagee was in possession, and he was as liable as if he were owner: *Jackson* v. *Vernon*. (3) If the mortgagee takes possession he is liable for the debts of the ship. There have been several transfers of the mortgage, and the transferror can only give such rights as he himself has: *De Mattos* v. *Gibson*. (4)

Cohen, in reply. The plaintiffs had no lien on the ship until the institution of the suit: Maclachlan on Shipping, p. 103. The question is, to whom credit was given? It is not stated that the master had any authority from the mortgagees to order the goods, and if he had not, the mortgagees are not liable. Either credit

(1) Brow. & Lush. 243. (3) 1 H. Bl. 114.
(2) Swabey, 353. (4) 1 Johns. & Hemm. 79, 84.

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was given to the ship or to the mortgagees; if to the ship, it was to the ship burdened with a mortgage; if to the mortgagees, they would be liable: *The Salacia.* (1)

Cur. adv. vult.

Nov. 27. DR. LUSHINGTON. I am of opinion that the second article of the reply should be rejected, and for the reasons stated in Mr. Cohen's argument. In the first place the article, as it stands, leaves it open whether the person in possession of the vessel at the time of the supply was the original mortgagee, or the defendant, who was the transferree of the mortgage. The plaintiff cannot call upon the Court to supply the defect of his reply by reference to the defendant's answer, the dates mentioned in which might seem to shew that if, as alleged in the reply, the person entitled to the mortgage money was in possession, that person was the defendant. And besides, the reply seems to speak of a series of persons successively becoming entitled, and successively being in possession. This vagueness of the reply as to who was in possession, the original mortgagee or the defendant, constitutes a serious defect, because, supposing the original mortgagee to be meant, the allegation would be immaterial, for until suit brought the necessaries-man would have no claim on the vessel: *The Pacific* (2); and a mere personal liability of the original mortgagee would not pass to the defendant by virtue of a transfer of the mortgage. If this were the only ground of objection, I should require the reply to be reformed. In the second place, it would not be enough to allege that the defendant, as transferree of the mortgage, was in possession at the date of the supply, for the mortgagee in possession, I am of opinion, would not be liable for necessaries supplied to the ship, unless the master in ordering the necessaries was acting as the agent of such mortgagee: *Hibbs* v. *Ross* (3); *Frost* v. *Oliver* (4); *Mitcheson* v. *Oliver.* (5) Reformation of the reply in this respect also would be necessary. In the third place, even an allegation that the defendant was in possession of the vessel at the date of the supply, was responsible for the orders given by the master, and personally liable for the supplies,

(1) Lush. 545. (2) Brow. & Lush. 243. (3) Law Rep. 1 Q. B. 534.
(4) 2 Ell. & Bl. 301. (5) 5 Ell. & Bl. 419.

would, in my opinion, not be a good reply to the answer of the defendant, who claims to be a mortgagee prior to the date of the supply. The case of the *Pacific* (1) decides that a necessaries-man has, until institution of suit, no claim upon a vessel owned, I will say by A., and consequently that a claim arising upon institution of suit is subject to existing mortgages, say the mortgage of B. I cannot see that this order of priority should be reversed, because, through B. having been in possession at the date of the supplies, A. and B. are practically one and the same person. The opposite view would complicate the law of mortgage. I come to this conclusion after due consideration of the *Jonathan Goodhue.* (2) I therefore reject the second article of the reply.

Second article rejected.

There were two other suits (3408 and 3412) instituted, the one by Samuel Baker, engineer, of Oil Street, Liverpool, against Edward F. Sichel, alleged mortgagee, in respect of repairs to the boilers of the *Troubadour,* while the vessel was lying in the port of Liverpool, in February and March, 1866; the other on behalf of McDonald & Co., of Liverpool, shipwrights, for repairs to the *Troubadour* in January, 1865, and February and March, 1866, while the ship was at Liverpool.

The allegations in the answers were to the same effect as in the suit for necessaries. The second and third articles of the replies were respectively as follows:—

2. "The defendant, at the several times mentioned in the petition, was in possession of the said ship, and thereby the master of the said ship was impliedly authorized by the defendant to do all things necessary to keep the ship in a proper condition to earn freight, and for that purpose to order the necessary repairs in question, and to bind the ship for the same in priority to the defendant's claim as alleged transferree of the mortgage.

3. "Even if the defendant was not in possession of the said ship at the said times, the said Gustav Sichel in the first article of the petition mentioned, was then in possession of the said ship, by and with the assent of the defendant, and thereby the master of the said ship was impliedly authorized," &c.

(1) Brow. & Lush. 243, 10 Jur. (2) Swabey, 524.
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The fourth article was to the effect that the defendant, by allowing the mortgagor to remain in possession of the ship, impliedly authorized the mortgagor and the master to do all things necessary, &c.

R. G. Williams, for the plaintiffs.
Cohen, for the defendant.

DR. LUSHINGTON. The second and third articles of the replies in the other two suits instituted against the same vessel, are open to this last objection, viz. that the necessaries-man could not, by institution of suit, acquire against the ship a claim which should take priority over the claim of the mortgagee in possession who had ordered those necessaries. I may also state that they are open to the lesser objection, that they do not allege that the master was actually authorized by the defendant to order the necessaries—they only allege that he was impliedly authorized, by reason of the defendant being mortgagee in possession; and no such implication is raised by law. They are, however, not open to the objection that they leave it doubtful whether the person in possession was the defendant, the transferree of the mortgage, or the original mortgagee, for they state that the defendant was in possession.

I need not consider the fourth article of the replies, which would vest the priority of the plaintiffs' claim over that of the defendant, upon the alleged fact of Gustav Sichel having been in possession. It does not appear who Gustav Sichel was, except that previous to the supply of the necessaries he had been and had ceased to be a mortgagee of the vessel.

Proctors for plaintiff in first suit: *Lowless, Nelson, & Goodman.*
Solicitors for plaintiffs in other suits: *Sharpe, Parkers, & Jackson.*
Proctors for defendant: *Cotterill & Sons.*

THE MACGREGOR LAIRD.

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Nov. 20.

Inspection of Documents.

On a motion by the defendants for leave to inspect certain correspondence between the plaintiff and his agent, the judge directed the documents to be produced for his own inspection before granting the application.

4 W.R. 6
10 Jur. 228

THIS was a cause of salvage, instituted by the owner and crew of the *Albreda* for services rendered on the 10th of March, 1865 near the entrance of the Gambia river, to the *Macgregor Laird*, a steamship belonging to the African Steamship Company.

The case now came before the Court on a motion by the defendants for leave to inspect certain letters in the possession of the owner of the *Albreda*, John Forster, who, in his affidavit as to the documents in question, stated that they were privileged communications, and consisted of correspondence between himself and his agent, Goddard, relating to the proceedings in the cause.

Vernon Lushington, in support of the motion. Correspondence between a party to a cause and any person not his solicitor is not privileged: *Goodall* v. *Little* (1); *Flight* v. *Robinson* (2); Taylor on Evidence, p. 797, 4th ed.; *Glyn* v. *Caulfield*. (3)

E. C. Clarkson, contrà. A plaintiff writing to his agent to give him instructions how to conduct his suit is not bound to allow his letters to be inspected by the defendant: *Hunt* v. *Hewitt* (4); *Thompson* v. *Robson* (5); *Woolley* v. *Pole* (6); *Chartered Bank of India* v. *Rich*. (7)

Vernon Lushington replied.

DR. LUSHINGTON. I have examined the cases at common law on this subject, but the whole question appears to me to be in a state of darkness and confusion. It would not be right for the Court to order documents to be produced of the contents of which it knows nothing. I direct that the documents in question be

(1) 1 Sim. (N.S.) 155.
(2) 8 Beav. 22.
(3) 3 M. & Gord. 463.
(4) 21 L. J. (Ex.) 210.
(5) 2 H. & N. 412.
(6) 14 C. B. (N.S.) 538.
(7) 4 B. & S. 73.

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produced for my inspection, and I shall then consider whether I ought to grant the present application.

Solicitors for plaintiffs: *Cotterill & Sons.*

Proctors for defendants: *Brooks & Dubois.*

Nov. 20.

THE WEST OF ENGLAND.

Pleading—Collision.

It is not necessary for the plaintiffs in their petition to state every fact material to their case—as that they complied with certain sailing rules—but it lies upon the defendants to allege the violation of such rules.

THIS was a motion in objection to the second article of the petition in a cause of damage instituted by the owners of the late brig *Rachel*, against the screw steamship *West of England.*

The article was as follows:—"At about noon of the 25th day of the said month [June, 1866] the weather was fair, and the said brig, in the prosecution of her voyage, was in the English Channel, between Start Point, on the coast of Devon, and the island of Portland, proceeding on the starboard tack, heading somewhere about E.N.E., with the wind S.E., when the above-named steamship, *West of England*, which was steaming down Channel, and steering about W. by N., instead of keeping clear of the *Rachel*, as she was bound and ought to have done, ran into and struck that vessel on the starboard side, and did her so much damage, that she almost instantly foundered, and the master and crew were unfortunately drowned."

E. C. Clarkson, for the defendants, in support of the motion. The plaintiffs ought to state in their petition whether this sailing-ship kept her course in accordance with the sailing rules, and if she did not, whether she deviated to avoid immediate danger.

Butt, for the plaintiffs, contrà.

DR. LUSHINGTON. I am not prepared to say that every petition ought to state every fact material to the case; I think it is sufficient if it states such facts, as would, if proved or admitted, estab-

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lish the plaintiffs' case. As this petition stands, it leads to the conclusion that the steamer was to blame, and I think that it lies upon the defendants to shew that the brig violated the rule, which, under the circumstances, directs that the sailing vessel should do nothing, but keep her course. It is not necessary for the plaintiffs to set forth that which it is for the defendants to allege if they mean to rely upon it.

Motion dismissed with costs.

Proctors for plaintiffs: *Clarkson, Son, & Cooper.*
Proctors for defendants: *Dyke & Stokes.*

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Jan. 22.

Costs—23 & 24 Vict. c. 127, s. 28—Suit by Master for Wages—Counter claim by Owner—Attorney's Charge on Property "recovered or preserved."

On a claim by a master for his wages and disbursements being referred to the registrar and merchants, a counter claim was made by the registered owner of the whole ship, which counter claim included money due from the master under an agreement to purchase certain shares in the ship. In the result it was found, that 103*l.* 7*s.* 8*d.* was due *to* the plaintiff on the balance of his account as master, and 173*l.* 11*s.* 1*d.* was due *from* him on account of the counter claim, thus leaving a balance due from the plaintiff.

On a motion by the plaintiff's attorney, under the 28th section of 23 & 24 Vict. c. 127, that he might have a charge for his costs in the suit upon the plaintiff's interest in the ship as being property "recovered or preserved":—

Held, that as the result of the suit to the plaintiff was, that he was entitled to a transfer of the shares in the vessel for a less sum than he would have been if the suit had not been instituted, the plaintiff's attorney had recovered or preserved the property to the plaintiff, and was entitled to a charge upon it for his costs to an amount not exceeding the sum so preserved.

THE original proceeding in this case was a suit brought on behalf of the master of the *Philippine* for his wages and disbursements, and an order was made referring the claim to the registrar and merchants to take the accounts between the master and his owner, when a counter claim was given in on behalf of the owner.

At the reference an agreement was produced, made between the defendant, the owner of the *Philippine*, and the plaintiff, upon the occasion of the appointment of the plaintiff as master

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of the vessel. The agreement, dated 25th of March, 1863, after reciting that the defendant was the owner of the *Philippine*, subject to a certain mortgage, and that he had recently sold to the plaintiff four sixty-fourth shares in the vessel for 250*l.*, provided that the defendant should be the managing owner of the vessel, receive freights, &c., and should account to the plaintiff for four sixty-fourth shares in her net earnings, and that the plaintiff should bear four sixty-fourth shares in her losses, and four sixty-fourth shares in the expenses of her outfit, and that in case the defendant should pay off the mortgage debt, and the plaintiff should have paid off his proportion of the expenses of the outfit, the defendant should transfer to the plaintiff four sixty-fourth shares in the vessel. The registrar, in taking the account, took this agreement into consideration as a counter claim, under the 191st section of the Merchant Shipping Act (17 & 18 Vict. c. 104). The result was, that 103*l.* 7*s.* 8*d.* was found due *to* the plaintiff upon the balance of his account as master, and 173*l.* 11*s.* 1*d.* was found due *from* him on account of the purchase-money of the four sixty-fourth shares, and his proportion of the loss upon the first voyage, and the registrar accordingly reported that, upon the whole, 70*l.* 3*s.* 5*d.* was due *from* the plaintiff to the defendant, and that in his opinion each party should pay his own costs. This sum was afterwards reduced by consent to 48*l.* 15*s.* 11*d.*

The case now came before the Court on a motion by Messrs. Howard & Co., the plaintiff's attorneys, that they might have a charge upon the *plaintiff's interest in the ship* for the amount of their taxed costs, charges, and expenses in the suit, and that an order might be made for payment of the same out of the plaintiff's interest. The motion was made under the 28th section of the 23 & 24 Vict. c. 127, which is in the following terms :—

"In every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter, or proceeding in any court of justice, it shall be lawful for the Court or judge before whom any such suit, matter or proceeding, has been heard, or shall be depending, to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved, and upon such declaration being made, such attorney or solicitor shall have a charge upon, and against, and a right to payment out of the pro-

perty, of whatsoever nature, tenure, or kind the same may be, which shall have been recovered or preserved through the instrumentality of any such attorney or solicitor for the taxed costs, charges, and expenses of, or in reference to such suit, matter, or proceeding; and it shall be lawful for such Court or judge to make such order or orders for taxation of, and for raising and payment of such costs, charges, and expenses, out of the said property, as to such Court or judge shall appear just and proper;" &c.

Jan. 15. *Vernon Lushington*, in support of the motion. The terms of the statute are purposely very general, and, it is submitted, apply to this case. This court is included in the term "any court of justice;" Messrs. Howard have been "employed in prosecuting" and also in "defending" in this suit, and "by their instrumentality" the interest of the plaintiff in this ship, which must be considered as covered by the words "property of whatsoever nature, tenure, or kind the same may be," has been "preserved." The course of the proceedings involved the determination of the conditions on which the plaintiff was entitled to be registered as the owner of four sixty-fourths of the ship: in other words, the value of his equitable ownership. By the services of Messrs. Howard, this equitable ownership was not only benefited to the amount of 103*l.* 7*s.* 8*d.* by establishing that sum to the credit of the master; but also to a further extent by reducing the owners' counter claim on the debit side. They therefore "preserved" the property from a substantial incumbrance. "Preserved" ought not to be confined to "preservation from total loss," for partial loss may be so large as to be on the very verge of total loss. In the case of *The Soblomsten* (1), a cause of salvage, in which the owners of the saved property were decreed to pay money, but a less sum than that claimed by the salvors, the Court held that the owners' proctors had a lien for their costs upon the proceeds of the property in court, and that in preference to a claim by a third party for necessaries. That decision went upon the practice of the Court and not upon the statute (which was however cited), but it illustrates the principle contended for.

E. C. Clarkson, contrà. The act does not apply to proceedings in this Court: By the interpretation clause (s. 1), the word

(1) Ante, p. 293.

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"attorney" shall mean attorney of one or more of the superior courts of law at Westminster, and "solicitor" shall mean solicitor of the High Court of Chancery.

At all events the act does not apply in this case; so far from anything being due to the master, there is a sum of nearly 50*l.* due to the owner *from* the master. It cannot be said that the property "has been recovered or preserved," within the meaning of the section.

Cur. adv. vult.

January 22. DR. LUSHINGTON [after stating the facts as above]: I have stated the facts as I believe them to have been; but I cannot abstain from saying that the matter is presented to the Court in a most unsatisfactory condition. The registrar's report has not been filed, neither party having thought proper to take it up. The paper which has been furnished to the Court, purporting to be a copy of the report, simply states that 70*l.* 3*s.* 5*d.* is the balance due from the plaintiff, but there is no evidence to shew that this balance has been arrived at in the manner I have already mentioned, except that the same sum 70*l.* 3*s.* 5*d.* appears to be the balance of an account which I find amongst the papers, and purports to have been put in by an accountant. However, there was no dispute as to these facts; and, it was admitted also, that the four sixty-fourth shares in the vessel had not been actually transferred to the plaintiff, but that the plaintiff had an equitable right to have them transferred.

Mr. Clarkson was heard against the motion on behalf of the defendant, the owner of the whole ship. He first contended that the statute did not apply to this Court. This argument, however, seems to me contrary to the plain words of the statute, which include attorneys or solicitors in "*any* court of justice." He contended, secondly, that as the statute gives to the solicitor a charge only on the property recovered or preserved through his instrumentality, and as the suit, so far from preserving or recovering any of the plaintiff's property, resulted in a balance being found by the registrar's report *against* the plaintiff, there was nothing for the statute to operate upon. The plaintiff sued for his wages and disbursements as master, and the registrar found that on his account

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as master the plaintiff was entitled to 103*l.* 7*s.* 8*d.*; and though this balance in *favour* of the plaintiff was turned to a balance *against* him, upon the registrar taking other accounts against the plaintiff, viz. in respect of purchase-money due from him for the four sixty-fourth shares of the vessel, and of his proportion of the loss upon the first voyage, yet the result of the suit to the plaintiff is, that he is entitled to a transfer of the shares in the vessel for a sum less by 103*l.* 7*s.* 8*d.* than he would have been if this suit had never been instituted. I am of opinion, therefore, that the plaintiff's attorney has recovered, or preserved for the plaintiff in this suit, property to the value of 103*l.* 7*s.* 8*d.*, and represented by, or rather contained in, his right to be made registered owner of four sixty-fourth shares in the vessel, and that the plaintiff's attorney is under the statute entitled to a charge upon the plaintiff's shares for his costs not exceeding the sum of 103*l.* 7*s.* 8*d.* This charge, however, is of course subject to the payment of the 48*l.* 15*s.* 11*d.* which it has been agreed is due to the defendant. With regard to the remainder of the motion, the Court can make no order directing the payment of the attorneys' costs out of the plaintiff's interest in the vessel. Before the Court can make any such order, it must have complete evidence of all the necessary facts of the case. At present, the Court has not the property under its control, and knows nothing about it.

Attorneys for plaintiff: *Howard, Dollman, & Lowther.*
Attorneys for defendant: *Green & Alpin.*

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Feb. 19.

Mortgage—Equities between Owner and Mortgagee—Merchant Shipping Act Amendment Act, 1862 (25 & 26 *Vict. c.* 63), *s.* 3—*Admiralty Court Act* (24 *Vict. c.* 10), *s.* 11—*Unlawful Arrest—Costs and Damages.—Fraud.*

Where an action has been brought in the Admiralty Court under 24 Vict. c. 10 s. 11, by the registered transferee of a mortgage, and the ship arrested, the Court will, in conformity with the 3rd section of the Merchant Shipping Act Amendment Act (25 & 26 Vict. c. 63), enforce equities between the owner and the mortgagee; and will, in estimating the right of the mortgagee, consider not only the registered documents, but all the transactions between the parties relative to the mortgage loan.

The plaintiff was the registered transferee of a mortgage expressed to be given as security for the payment of an acceptance on a certain date, which date was past before action brought; but he had, by other arrangements, contemporaneous and subsequent to the transfer, agreed for postponing repayment, and by such arrangements repayment of no part of the money was due at the time of action brought; and it was not proved that the owner had done anything impairing the security of the mortgagee.

The action was dismissed with costs.

The plaintiff was further condemned in damages, on the ground that with adequate knowledge of the circumstances he had arrested the ship when no money was due to him; after a decision, moreover, of magistrates, adverse to his claim; and that he had endeavoured to make good his claim by bringing charges of fraud, which he failed to sustain, against the owner.

Various circumstances alleged to shew fraud considered.

This was a suit instituted under the 11th section of the Admiralty Court Act, 1861 (24 Vict. c. 10), by the plaintiffs, George Hermann Wulff, and Benjamin Sydney Smith, as mortgagees of the ship *Cathcart*.

The section is as follows:—"The High Court of Admiralty shall have jurisdiction over any claim in respect of any mortgage, duly registered according to the provisions of the Merchant Shipping Act, 1854, whether the ship, or the proceeds thereof, be under arrest of the said Court or not."

The circumstances of the case, and the points argued, are fully detailed and commented on in the judgment.

The following statutes are material to the case.

Merchant Shipping Act (17 & 18 Vict. c. 104).

Section 70.—"A mortgagee shall not, by reason of his mortgage, be deemed to be the owner of a ship or any share therein, nor shall

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the mortgagor be deemed to have ceased to be owner of such mortgaged ship or share, except in so far as may be necessary for making such ship or share available as a security for the mortgage debt."

Section 71.—"Every registered mortgagee shall have power absolutely to dispose of the ship or share in respect of which he is registered, and to give effectual receipts for the purchase money; but if there are more persons than one registered as mortgagees of the same ship or share, no subsequent mortgagee shall, except under the order of some Court, capable of taking cognizance of such matters, sell such ship or share without the concurrence of every prior mortgagee."

Merchant Shipping Act Amendment Act (25 & 26 Vict. c. 63).

Section 3.—"It is hereby declared that . . . . . without prejudice to the powers of disposition and of giving receipts conferred by the principal Act on registered owners and mortgagees, and without prejudice to the provisions contained in the said Act relating to the exclusion of unqualified persons from the ownership of British ships, equities may be enforced against owners and mortgagees of ships in respect of their interest therein in the same manner as equities may be enforced against them in respect of any other personal property."

Brett, Q.C., and *Pritchard*, appeared for the plaintiffs.

Cohen, for the defendant.

Cur. adv. vult.

Feb. 19. DR. LUSHINGTON. The plaintiffs are Messrs. Wulff & Smith, ship-brokers in the city of London. The defendant, Alexander Robinson, describes himself as a ship-owner.

The defendant became the owner of this vessel, the *Cathcart*, in the month of August, 1865, by a bill of sale from a Mr. Rennie, of Aberdeen. The purchase-money was 2250*l.*: half of this, according to the defendant's account, was paid in cash; for the other half he gave his acceptance, to fall due on the 16th of March, 1866; and, as a security for the payment of the acceptance, gave to Mr. Rennie a mortgage on the ship, dated the 18th of September. On the 1st of February, 1866, the defendant paid off Mr. Rennie by cash received from the Maritime Credit Company, Limited,

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and Mr. Rennie's mortgage was cancelled. The arrangement between the defendant and the Maritime Credit Company was this: the defendant gave them his acceptance of a bill of exchange for 1650*l.*, to fall due on the 3rd of May; whilst the company advanced to him that same sum (1650*l.*), less deductions for commission and interest to accrue up to the 3rd of May, amounting together to 74*l.* 13*s.* 8*d.*; the defendant also gave them a mortgage upon the vessel. This mortgage was dated the 1st of February, 1866: it was a mortgage of the vessel only, not of freights or policies: it purported to secure not only the payment of the bill of exchange, but also the repayment of any further advances that might be made to the defendant by the company: however, in fact, no further advances were made. In form also, the mortgage was not a port mortgage; but it was so practically, for the company took possession of the register, without which the vessel could not be cleared outwards. This mortgage was registered on the 2nd of February. The Maritime Credit Company were thus the first mortgagees of the vessel.

On the 6th of March, the defendant by bill of sale transferred the vessel to Conté, a gentleman who, according to his own account, had been engaged in the Italian trade, subject, of course, to the mortgage of February 1st, and on the same day, March 6th, Conté mortgaged his equity of redemption in the vessel to the defendant for 850*l.* On the 15th of March this mortgage was registered. The result of these transactions was that Conté was the registered owner, subject to two mortgages:—

1st. To the Maritime Credit Company, for 1650*l.*

2nd. To the defendant, for 850*l.*

In April the first dealings of Conté and the defendant with the plaintiffs commenced. It appears that there was some prospect of procuring a charter from Messrs. Livingston for the vessel to go to Rangoon and Moulmein; but there was a difficulty with the Maritime Credit Company, who refused to part with the register so as to let the vessel go, until the 1650*l.* had been paid. The defendant offered to the brother of the plaintiff Smith 50*l.*, if he would find some person to advance the money to pay off the Maritime Credit Company. Mr. Smith then introduced the defendant to the plaintiffs, who, up to that time, were perfect

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strangers to the defendant and Conté. The plaintiffs required to see Conté's references, and finding them satisfactory, entered into negotiations with the defendant, who, as the plaintiffs were informed by Conté, had authority to act for him (Conté), and to arrange the details and the chartering of the vessel.

After some unsuccessful overtures, the plaintiffs sent to Conté the letter of April 17th, containing the following offer:—

"Dear Sir,—We are willing to advance you 1500*l.* on a clean mortgage of the *Cathcart* on the following conditions, viz.:—

That the balance of homeward freight due on ship's arrival in Great Britain be included in such mortgage.

That we insure the ship out and home for 3000*l.*, and also the homeward freight, premiums on which are to be paid us in cash before the vessel sails, and the policies to remain in our hands.

That we have 2½ per cent. on the freights of this vessel until the mortgage be paid off, whether the charters be effected by us or not, and that she is to be reported by us or our agents, on her return to Great Britain, paying us ten guineas if from a long voyage, or five guineas if from a short one.

That we receive 10 per cent. interest per annum for the moneys lent on this mortgage, and an extra 2½ per cent. commission on 300*l.* of same.

That 750*l.* is to be paid back by you, with all interest and commission thereon, within six months from the date of mortgage, and the balance within twelve months from same date.

That our solicitor draw up the mortgage at your expense, and that the same be executed, and the money paid over in his presence.

150*l.* to be advanced on a port mortgage on demand, you paying us 2½ per cent. commission, and interest at the rate of 10 per cent. per annum.

Wulff & Smith.

P.S.—It is agreed that the above-mentioned sum of 1650*l.* is to be employed in transferring the present mortgage of like amount, and on the said ship *Cathcart*, from the maritime credit to ourselves.

Wulff & Smith.

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I accept the above on behalf of the owner, Mr. G. Conté, and for myself as second mortgagee.

Alexander Robinson,
17th April, 1866.

I accept the above,—G. Conté."

This letter of the plaintiffs to Conté of the 17th of April, was the basis of all future arrangements, and it is important for the proper understanding of the subsequent course of events, to consider its contents somewhat minutely. In the first place it is clear that on this occasion both Conté and the defendant represented themselves to the plaintiffs to be what they then actually were, namely, the one the registered owner of the vessel, the other the second mortgagee of the vessel, and acting as agent for the registered owner. In the second place, to compare the position which the Maritime Credit Company were holding with that which the plaintiffs were about to adopt. The position of the Maritime Credit Company under the mortgage was this: they held what was substantially a port mortgage; their security was the security of the vessel alone, and the thing secured to them was the payment of the defendant's acceptance for 1650*l.*, without interest (that having been already deducted), on the 3rd of May. But by the arrangement about to be made with the plaintiffs, the mortgage to the plaintiffs was to be a free one, at least to the extent of 1500*l.*; their security was to comprise not only the vessel, but the balance of homeward freight (not, however, it should be observed, the advance of freight); the money secured to them was 1500*l.*, together with divers commissions, premiums, &c.; and this money was to be repaid half at the expiration of six months after the date of the new mortgage, and the other half at the expiration of a year. In addition the plaintiffs were, if required, to advance 150*l.* upon a *port* mortgage.

The first idea may have been that the mortgage to the Maritime Credit Company should be cancelled, and that the whole of the agreement between the plaintiffs and Conté should be embodied in a single new mortgage to the plaintiffs. But, as would appear from the postscript to the letter of the 17th of April, and from an item in Mr. Billing's bill of costs, the course preferred was for the plaintiffs to take a simple transfer of the first mortgage, and, in addition, to take a supplementary security, in order to give effect to the rest of

the arrangement. But at this time the defendant was second mortgagee, and as such would, of course, rank behind a transferree of the first mortgage, but before the holder of any mortgage dated subsequently to his own. In order, therefore, to secure for the plaintiffs complete priority over the defendant, the plaintiffs' solicitor thought it necessary to stipulate that the new mortgage to the plaintiffs should be a *clean* mortgage, and accordingly it was verbally arranged between the parties that, before the security to the plaintiffs was executed, the defendant should cancel his mortgage; it being, of course, understood that *after* the plaintiffs had been so secured, his mortgage should be renewed.

In pursuance of this arrangement, the first step taken was for the plaintiffs' solicitor, Mr. Billing, to prepare a draft of the new security to the plaintiffs: the indenture of April. The contents of this were as follows:—The parties were, Conté as mortgagor, and the plaintiffs as mortgagees. The draft indenture (being intended for execution immediately after the execution of the transfer to the plaintiffs of the first mortgage) recites as follows:—

> The mortgage to the Maritime Credit Company.
>
> The sale to Conté.
>
> That Conté was the registered owner, subject to the mortgage.
>
> That the plaintiffs had consented to take an assignment of the mortgage upon having the said sum of 1650*l.* secured by a transfer of the said mortgage, and also by the indenture which I am now stating.
>
> That the transfer to the plaintiffs of the mortgage had been executed by endorsement.
>
> That the transfer had been made to secure to the plaintiffs the repayment of the said sum of 1650*l.* and interest thereon at the rate of 10*l.* per cent., and other moneys and commissions thereinafter mentioned.
>
> That the vessel was about to be chartered.
>
> That it had been agreed that the vessel, on her return voyage, should be addressed to the mortgagees and reported by them.

The draft then contained a grant by Conté, first of all freights "except such as might, in the usual course of business, be advanced to Conté under any charter-party," and secondly, of all policies on

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ship and freights. This was the security of the mortgagees. Then followed a covenant by Conté to pay:—

1. 150*l.*, with interest, commission, &c., before the vessel left England, or rather the port of London.
2. 750*l.*, with interest, commission, &c., on the 19th of October, 1866, or on the return of the vessel.
3. 750*l.*, with interest, commission, &c., on the 19th of April, 1867.
4. The legal costs of preparing the deed forthwith.
5. Further advances that might be made by the plaintiffs, or moneys for which the plaintiffs should become liable in respect of the vessel. } from time to time on notice in writing for that purpose to be given to or left at the last known place of residence in England of Conté, or his assigns.

In default of payment of the 1650*l.*, or interest, or commission, or "of any other debt, or sum of money, commission or interest, intended to be secured by the indenture on the days and times therein before appointed for the payment thereof respectively," there was given to the plaintiffs power, without any further authority from Conté, to take possession of and sell the *ship*, and to appropriate the freights and policies. Under no other circumstances was authority given by this instrument to take possession of and sell the ship. The plaintiffs were further authorized to insure the vessel and freights in whatever sum they thought proper and to charge thereupon the premiums and interest: and Conté covenanted that the plaintiffs should act as agents for the vessel, and that the vessel should be addressed to them.

On the 19th of April in order to execute the arrangement, there was a meeting of all the parties in the office of the plaintiffs, viz., the two plaintiffs, the defendant, Conté, and Mr. Billing, the solicitor to the plaintiffs. Conté executed the new indenture (the substance of which I have just stated), and gave it to Mr. Billing; the defendant endorsed satisfaction upon his mortgage of March 6th, and gave that also to Mr. Billing; then Conté executed in favour of defendant another document which Mr. Billing, supposing it (as he swears he did), to be a re-mortgage from Conté to the defendant in lieu of the cancelled mortgage of March 6th, asked for and took

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possession of, and at the same time announced his intention of forwarding the plaintiffs' documents (*i.e.* the transfer of the mortgage of February 1st, and the cancellation of the defendant's mortgage of March 6th), for registration to Aberdeen by the next post, and of forwarding the defendant's document—the one in question—by the succeeding post, to the same place, likewise for registration. This document of the defendant's, however, was beyond all doubt not a re-mortgage to him, but a bill of sale to him from Conté.

Before the meeting broke up Mr. Billing gave to the defendant the following receipt:—

"Memorandum.—I have received from Mr. Robinson, his bill of sale, of the ship *Cathcart*, to him to be registered as cancelled, and if the transaction be not carried out with Messrs. Wulff & Smith, then I undertake to redeliver the same to him.

John Billing.

19th of April, 1866."

I confess the terms of this receipt are inexplicable to me; I am quite at a loss to say to which of the two documents that were given to Mr. Billing by the defendant at this interview, this receipt of "bill of sale to defendant, to be registered as cancelled," refers, whether to the *mortgage* of March 6th, which certainly was to be registered as cancelled, or to the *bill of sale* from Conté, which as certainly was *not* to be registered as cancelled. But it is difficult to avoid the inference, that the words bill of sale found their way into the receipt, from the unquestionable fact that a bill of sale had been received by Mr. Billing on that occasion.

This interview over, all those present, except the plaintiff Smith, went on at once to the office of the Maritime Credit Company, to complete the transaction: there Mr. Wulff paid to the secretary the 1650*l.*; the secretary executed the transfer to the plaintiffs of the mortgage of the 1st of February; delivered to the plaintiff Wulff the register of the vessel for the plaintiffs to keep in right of their port mortgage for 150*l.*; and then, with the consent of the plaintiff Wulff and Mr. Billing, delivered back to the defendant his acceptance for 1650*l.*, about to fall due on May 3rd. Mr. Billing duly sent to Aberdeen, for registration, both the plaintiffs' documents, viz., the transfer, dated April 19th, of the mortgage of

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February 1st, and also the cancellation of the mortgage of March 6th; and the registration of both was effected on April 21st. Mr. Billing, however, did not send for registration the other document which he had received from the defendant—I mean the bill of sale; he kept it in his possession for five days. On the 24th the defendant called upon him, and finding it not registered, said he would get it registered himself if Mr. Billing would give it up to him. Mr. Billing thereupon did give it up to him, and attested the execution of it by Conté, which execution by Conté, as I have already stated, had taken place on April 19th, in Mr. Billing's presence. The defendant had the bill of sale duly registered on the next day, the 25th, and thereupon—whether the fact was known to the plaintiffs and Mr. Billing or not—became registered owner of the *Cathcart*, subject, of course, to the mortgage to the plaintiffs. Conté, according to the documents already mentioned, ceased to have any legal interest in the vessel, but it seems that there was, between himself and the defendant, some private understanding to the contrary. What that understanding was the Court cannot say, and it is not very material to the purposes of this suit. So far as I could conjecture from the evidence of the defendant and Conté, it was that as between them their positions should be substantially the same as before the transactions of April 19th, viz., Conté should be the real owner, and the defendant should be mortgagee for 850*l*. Why, if this was to be so, Conté should have on the 19th of April executed the bill of sale, making the defendant registered owner and depriving himself of all ostensible interest in the vessel, I cannot form any opinion. The only explanation that Conté and the defendant offer for this matter is, that it was verbally agreed between them that the defendant should re-transfer the vessel to Conté, upon Conté paying to him an instalment (howsoever small is not specified) of the 850*l*., and should take a mortgage for the residue of the 850*l*. remaining unpaid. Nothing can be more vague and unsatisfactory than this; and looking to the respective positions of the parties, how that Conté was not in the ship-owning trade, and that the defendant was an uncertificated bankrupt without any place of business, and experiencing great difficulty in getting persons to enter into a charterparty with him, and looking to their subsequent dealings as brought to light by this suit, I cannot resist

the conclusion that the defendant found it convenient from time to time to put Conté forward as the owner of the vessel, he himself negotiating arrangements as Conté's agent, and of course allowing Conté for the use of his name some interest in the vessel and its earnings.

Pending the negotiations of April 19th between the plaintiffs and defendant and Conté, the contemplated charterparty with Mr. Livingston for Rangoon went off.

In the month of May the defendant entered into a charterparty with Messrs. Gellatly for the vessel to go to Antwerp, and thence to the Havannah. A copy of the charterparty is produced; it is made by the defendant (and not Conté) as owner of the vessel. On May 9th the defendant called upon the plaintiffs; they depose that he only informed them generally of a charterparty provisionally entered into with Messrs. Gellatly; but he swears that he shewed them a copy of the original, by which, of course, they would see that he had made the charter as owner of the vessel. However this may be, on the strength of this charterparty the defendant asked the plaintiffs for the register; the plaintiffs at first refused, but a day or two later, on the defendant lodging with them scrip for the Egyptian Loan of 200*l.* duly paid up, as a security for the payment of the 150*l.*, the plaintiffs gave up to the defendant the register of the vessel. However, in the course of a few days, Messrs. Gellatly failed, and the proposed charterparty with them fell through.

On the 6th of June the plaintiffs being dissatisfied with the vessel not being chartered, and generally with the conduct of the defendant, whom they allege they thought to be Conté's agent, served upon Conté (not on the defendant) the following notice:—

"Dear Sir,—We beg to hand you herewith an account of moneys paid on your account in respect of the ship *Cathcart*, up to this date, amounting to twenty-two pounds fourteen shillings and fourpence (say 22*l.* 14*s.* 4*d.*), exclusive of other moneys due to us, and request that such sum be paid to us within twenty-four hours from this time, and in default we shall exercise the powers over the ship vested in us by the securities we hold.—We are, dear Sir, yours truly,

Wulff & Smith."

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The account sent with this letter purported to be an account between the plaintiffs and Conté, not between the plaintiffs and defendant. The items were disbursements made for the vessel, and also an item of 9*l.* for the law costs of the arrangements of the 19th of April.

On the next day, according to the defendant's account, the defendant called upon the plaintiffs, and tendered them a 100*l.* note, out of which they were to pay themselves their account, less however the sum of 9*l.*, the defendant insisting on the right of having the costs taxed before they were paid. This offer the plaintiffs declined. The next day, the 8th of June, the defendant called again, and according to his own account tendered the plaintiffs the same 100*l.* note in payment of the whole account, law costs and all, without reservation, and the plaintiffs thereupon said, "It is not money we want, but a charter for the vessel," and offered him to procure him a charter to take a cargo of iron at Middlesboro' and proceed to Alexandria. This account is denied by the plaintiffs: but it is certainly true that on the same day the following agreement was made through the defendant between the plaintiffs and Conté, which made special provision for the payment of disbursements.

"Sir,—It is this day agreed between us that the *Cathcart* shall be chartered to Alexandria under the following conditions:—

We are to receive the whole freight as per charter, out of which we are to pay necessary disbursements, as well as 150*l.* and interest at 10 per cent. per annum, and $2\frac{1}{2}$ commission on same, and also $2\frac{1}{2}$ per cent. on 300*l.* to ourselves. Insurance on the ship for 3000*l.* from London to Middlesbro' and thence to Alexandria, and balance of freight, to be paid on ship having sailed from Middlesbro'.

The ship is to be consigned to our agents at Middlesbro'. You shall appoint the captain, but his references must be satisfactory to us.

Yours truly,

Wulff & Smith.

I agree to the above, G. Conté."

It is perhaps worth observing that this letter, as it was originally framed, directed that the balance of freight should be paid to the

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defendant, and that the defendant's receipt should be a sufficient acknowledgment; but Conté, in signing it, altered it to the form as I have stated it.

On the same day, in pursuance of the agreement, the charterparty was completed. It was made between Conté, as owner of the vessel, and Messrs. Oppenheim; Conté undertaking that the vessel should proceed to port of lading within three weeks, and be prepared to load in all July; that the ship being tight, staunch, and strong, and every way fitted for the voyage, should with all convenient speed proceed to any usual and safe loading-place at Middlesboro' on Tees, and there load a full cargo for Alexandria.

Messrs. Oppenheim undertaking to pay freight at 31*s.* 6*d.* per ton, which, assuming a full cargo to be about 650 tons, would amount to about 1100*l.* This freight was to be paid in cash, less 7 per cent., upon presentation of bills of lading, and to be paid to the plaintiffs.

A commission of 5 per cent. was to be due from the ship to the plaintiffs, and the vessel was to be entered and cleared at the custom-house at port of loading by their agents.

The execution of this charterparty by Conté, as owner, was attested by the defendant.

On June 11th, the defendant appointed to be captain of the vessel a person who was a stranger to himself, but had been recommended to him by a clerk in the plaintiffs' office—a Captain Seaton—and the plaintiffs examined and approved his references. The defendant gave to Captain Seaton instructions in writing as to loading at Middlesboro'. On the 13th the vessel sailed from London. On the day after the plaintiffs returned to defendant his Egyptian bonds, which had been deposited to secure the payment of the 150*l.* and commission that by the new agreement of June 8th was to be paid out of the freight which the plaintiffs were to receive upon presentation of bills of lading.

The vessel reached Middlesboro' on Tuesday, June 19th, and was there consigned to Messrs. Muller, the plaintiffs' agents.

It appears that before the vessel had arrived at Middlesboro', the plaintiffs had become dissatisfied with, and suspicious of, the defendant: they had instructed Mr. Muller, their agent at Middlesboro', to pay all the bills for the ship direct, and none through

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the defendant. They had also sent a letter to the captain to await his arrival at Middlesboro', warning him against the defendant, bidding him (the captain) to look to them for orders and not to the defendant, and giving directions as to the repairs of the vessel.

The master, having omitted (in accordance with his instructions from the defendant) to announce to defendant by telegraph his arrival at Middlesboro', the defendant goes down to Middlesboro', goes on board, and takes command as owner, or representing the owner. The captain keeps the plaintiffs apprised of the conduct of the defendant, and tells the defendant of his orders from the plaintiffs. An angry correspondence thereupon ensues between the plaintiffs on the one hand, and the defendant and Conté on the other, each party accusing the other of interference, the plaintiffs evidently assuming that as mortgagees they are entitled to the control of the vessel.

The captain sides with the plaintiffs, and demurs to an order of the defendant's, to take the vessel out of the dock to a wharf in the river, there to remove 100 tons of ballast, and replace them by an equal weight of iron cargo; the defendant thereupon dismisses him on Thursday, the 21st, and appoints a Captain Tate in his stead. On the 22nd the plaintiff Smith comes down and goes on board with Captain Seaton; the defendant orders them out of the vessel, and on their refusal summons them before the magistrate. The defendant then produced the necessary documents to shew that he was the registered owner, to the alleged great surprise of the plaintiff, who deposes that up to that time he had thought him only second mortgagee, and agent only for the owner. The magistrate decided in favour of the defendant, ordered the plaintiffs to leave the defendant in possession of the vessel, and bound them over to keep the peace.

On Monday, the 25th, the plaintiffs' solicitor drew up the following notice:—

"To Graziano Conté and Alexander Robinson.

We hereby give you notice and require you to pay to us forthwith the sum of 440*l.*, which we have paid on account of you, or some or one of you, on account of the ship *Cathcart*. If the same be not paid we shall proceed to sell the said ship, in pursu-

ance of the said powers and authorities vested in us for such purpose. 1867

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Yours, &c.,

Wulff & Smith,"

and sent a copy to M. Conté to his address in London, and to the defendant to what they erroneously thought to be his address, and forthwith on the same day instituted this suit by causing the vessel to be arrested. The notice was not actually served upon the defendant till the 5th of July.

The object of the suit is to invoke the jurisdiction conferred recently upon the Court (by the 11th section of the Admiralty Court Act, 1861), to assist the plaintiffs in enforcing their claim as mortgagees. The affidavit to lead the warrant simply referred to the mortgage of February 1st, stated that the plaintiffs were the registered transferrees of that mortgage, and that under that mortgage the sum of 1650*l.* and commission and interest was made payable on the 3rd of May, and—most incorrectly—that they had no other security. The petition alleges that, under the circumstances set forth, the sum of 1650*l.* and also the sum of 440*l.*, making up the sum of 2090*l.*, together with commission and interest are due to them, and prays the Court to pronounce for the mortgage, and that the said sum of 2090*l.*, together with commission and interest thereon, is due to the plaintiffs.

The first question, then, for the Court is, whether any default has been made in payment of the moneys secured by the mortgage at the time agreed upon between the parties. To take first the mortgage of February 1st, transferred to the plaintiffs on April 19th.

This mortgage was to secure the payment of the defendant's acceptance of May 3rd. In June, that time had of course long past, and the plaintiffs contend that the money was then due to them as transferrees of that mortgage, and that default had been made justifying them in invoking the jurisdiction of the Court to enforce their mortgage. But I must consider the equities between the plaintiffs and the defendant, for here there are no third parties concerned. The statute (Merchant Shipping Act Amendment Act, 1862, s. 3) prescribes that, without prejudice to the power of disposition to third parties therein mentioned, concerning which no question

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arises in this case, "equities may be enforced against owners and mortgagees of ships in respect of their interest therein in the same manner as equities may be enforced against them in respect of any other personal property." In my opinion the transfer of the mortgage of February 1st cannot be considered separately from the indenture of April 19th. The two were executed concurrently as parts of the same transaction. There was only one sum of 1650*l.* borrowed, and to be repaid. This clearly appears from the whole tenor of the indenture of April 19th, the recital that the plaintiffs had consented to take an assignment of the mortgage of February 1st upon having the said sum of 1650*l.* secured by a transfer of that mortgage, and *also* by the indenture of April 19th—the recital that the transfer was made to secure to the plaintiffs the repayment of the said sum of 1650*l.* and interest thereon at 10 per cent., and other the moneys and commissions thereinafter mentioned—the elaborate provisions for the repayment of the moneys by instalments—the final provision, that in default of payment the plaintiffs were to take, not only the freights and policies (which alone were granted by the indenture), but also the ship (which had been granted not by that indenture, but by the mortgage of February 1st). Lastly, look to the significant fact, that at the time of the transfer the defendant's acceptance, the payment of which the mortgage of February 1st had been given to secure, was returned to him. With these considerations before me, I am satisfied that the intention of the parties was that the two deeds, the mortgage of February 1st, transferred on April 19th, and the indenture of April 19th, were to be read as one deed. The combined effect would be that, on the one hand, the plaintiffs would have for their security not only the vessel, but also freights and policies; and the money secured would be not only a bare 1650*l.*, but that sum together with very high commission and interest; but, on the other hand, the moneys were to be repaid not on the 3rd of May, as specified in the mortgage of February 1st, but at the times and in the manner prescribed by the indenture of April 19th.

Then, under the indenture of April 19th, was any money due to the plaintiffs at the date of the arrest of the vessel? Here again a similar question arises, to be dealt with in the same way.

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The indenture of April 19th must be read in connection with the new agreement of June 8th, and be modified accordingly.

Under the indenture of April 19th, the plaintiffs were authorized to receive only the balance of homeward freight, Conté being entitled to the *advance* freight; the first instalment of 750*l.* was not due to the plaintiffs till the 19th of October, 1866, on the return of the vessel; but 150*l.*, with commission, &c., was payable before the vessel left London; and disbursements were made payable on presentation of notice. Into these particulars the new agreement of June 8th introduced changes; the plaintiffs were thereby empowered to receive the *whole* of the freight, about 1100*l.*, and that freight was payable entirely in *advance* upon presentation of bills of lading; out of the freight the plaintiffs were to repay themselves disbursements, and also 150*l.* and interest.

It seems to me then quite clear that, until the freight had been paid, no default had been made by the mortgagor, in respect of repaying disbursements, and consequently that the plaintiffs, as mortgagees, were not entitled to arrest the vessel, or otherwise to interfere with its management, and that their conduct at Middlesborough was an unlawful intrusion.

I have dealt with the only case which I consider is presented to the Court by the pleadings. But at the hearing several collateral issues were raised by the plaintiffs, with a view to shew that a decree should be made in their favour. I cannot pass by these issues altogether without consideration.

It is said that the defendant fraudulently concealed from the plaintiffs the fact that he was registered owner of the vessel. I admit that a most unsatisfactory mystery rests upon this part of the case. Why the defendant, if his purpose was that Conté should appear the owner of the vessel, had his own name put on the registry; whether Conté, at the time of executing the bill of sale of April 19th to the defendant, knew that it was a bill of sale; what are the existing relations between defendant and Conté, except that Conté does not complain of them; in what manner they carry on the business of shipowners without office, without papers, and, so far as I see, without capital: all this is left in mystery, and I may say in suspicion. Nevertheless, it seems

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impossible to impute to the defendant fraudulent concealment of his bill of sale. No fraudulent object is proved to be gained by such concealment from the plaintiffs. There was no apparent attempt to conceal the bill of sale when it was executed. The defendant caused Conté to execute it in the presence of the plaintiffs and their solicitor, Mr. Billing, and Mr. Billing himself, attested its execution; the plaintiff gave it to Mr. Billing to get it registered; Mr. Billing kept it in his possession for several days and might of course have examined it; and if he had registered it, he would of course have ascertained its contents. After this, especially as the result of the transaction stood recorded on the public register, the defendant may not unfairly have presumed the plaintiffs to be aware of his being the owner. This is the only excuse for the defendant being privy to the plaintiffs' negotiating with Messrs. Oppenheim a charterparty with Conté, who was not the owner. But under the circumstances I cannot say that the plaintiffs can charge this as fraud against themselves. And this is the only act of the defendant's which appears incompatible with his being the owner. His other acts are equally compatible with his being the owner or the agent of the owner. At the same time it is not necessary to discredit the statement of the plaintiffs and Mr. Billing that they throughout believed Conté to be the owner.

Again, I do not see how the plaintiffs were damnified as mortgagees. They were not deceived in the matter of the mortgage. The transfer to them of the mortgage of February 1st was made by the person (Conté) who was then really the registered owner. There is no ground for saying that the plaintiff stipulated, as part of the contract, that Conté should execute a re-mortgage to the defendant, though they doubtless anticipated that such would be the case. All that interested them was that the *old* mortgage of the 6th of March should be taken off the register, not that a *new* one should be put on. It is equally groundless to say that it was a breach of the contract for the defendant to take a bill of sale from Conté. The indenture of April 19th, so far from prohibiting Conté from alienation, on the contrary, contemplated it as possible: it being specified therein that "the word mortgagor (Conté) should be taken to apply also to the assigns of the mortgagor." Conté could have assigned to the defendant, or any other person, when-

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ever he thought proper, and was under no obligation to give notice to the plaintiffs of such alienation. In fact, the alienation could not affect the plaintiffs' rights as mortgagees; their rights were secure, whoever was owner of this vessel. Who stood on the register was the concern, not of the plaintiffs, but of Conté and the defendant, and any merchants to whom the vessel might be chartered. Further, neither the ignorance of the plaintiffs as to who was the registered owner, nor the discovery of the truth, seems to me to have misled the plaintiffs into bringing this action; for the case of the plaintiffs was that they thought the defendant represented the owner, was his agent. In fact, they proceeded, as mortgagees, to realize their security, and, as alleged, in fear that the defendant, as representing the owner, was going to send the vessel to sea in an unseaworthy state. Another point raised by the plaintiffs is, that the defendant, for fraudulent purposes of his own, was about to send the vessel to sea in an unseaworthy condition. This is a very grave charge, but in my opinion it is not proven. No adequate ground is shewn for the commission of such a crime. It may be that the amount of the insurances, 4000*l.* (policies for 3000*l.* effected by the plaintiffs, and one for 1000*l.* by the defendant), was greater than the gross value of the vessel, which, on the occasion of the transfer of the vessel from the defendant to Conté, in March, 1866, appears to have been taken at 2500*l.* But the defendant declares that he made his policy of 1000*l.* only because he distrusted the solvency of the company from whom the plaintiffs had obtained their policies, and after remonstrating with the plaintiffs and calling upon them to cancel their policies; and he is borne out by the result, for the company with which the plaintiffs effected their insurance for 3000*l.* has since failed.

Still more defective is the evidence to shew that the vessel was unseaworthy, or that the defendant wished to send her to sea in an unfit condition. The vessel had been re-classed in 1862, at Lloyd's, as A 1, and had been on no voyage since; had only lain in St. Katharine's dock, waiting for a charter; and, in my opinion, the evidence adduced by the defendant, especially that of Captain Carr, far outweighs that for the plaintiffs, and proves that the vessel was strong and substantially seaworthy, at least for a voyage to Alexandria; and that what deficiencies there were—deficiencies

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in running gear, boats, and caulking—might very well have been made good at Middlesborough, whilst the vessel was being loaded, and as well after as before the 100 tons of iron cargo had been substituted for the same weight of ballast. Nor do I see any reason to think that the defendant was disinclined to have had these necessary repairs made good, or that the wharf at which the defendant was about to load the cargo was otherwise than a proper one for a ship like the *Cathcart;* or that he had any design not fairly to carry out the charter. Of course, as owner, he had a motive, which the plaintiffs, as mortgagees, had not, to keep down the expenses of the ship. But, in my opinion, the charge of fraud falls altogether to the ground.

It is hardly worth while to mention the other minor charges made at the hearing against the defendant; as, for instance, that he had misappropriated the money furnished by the plaintiffs for the supplies of the vessel, or that, contrary to the agreement of the 8th of June, he took the vessel out of the hands of the plaintiffs' agent at Middlesborough; of these, I find no proof whatever. Then as to the charge, that the defendant, even if he had a right to dismiss Captain Seaton from the command, had none to appoint Captain Tate, unless the plaintiffs had first approved of the references; and that, in so doing, he committed a breach of the agreement of the 8th of June. Even if this charge were proved, it would by no means follow that such a breach of the agreement would accelerate the time when the plaintiffs' mortgage money was payable, or would justify the plaintiffs in arresting the vessel.

The sum of the case, then, seems to be this, that the plaintiffs arrested this vessel, to use their own words, partly because they "thought they had a right to the possession, in the first instance, under the transfer of the mortgage of the 1st of February, the payment of which was due on the 3rd of May;" and also, because they "thought the defendant wanted to get the ship away in an unsatisfactory condition, and the plaintiffs would not allow it, having given their word to the underwriters that the ship should be repaired."

It turns out that in both these respects the plaintiffs were mistaken in their opinion. Neither had they right to possession under the transfer of the mortgage of the 1st of February; nor

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was there ground for supposing that the defendant did mean to send the ship away in an unseaworthy condition. In a word, the plaintiffs arrested the vessel without cause.

Under the circumstances, I have to consider what should be the decree of the Court. I have paid full regard to the conduct of the defendant. And I have also given due weight to the case of the *Evangelismos* (1), in which the Judicial Committee declined to award damages to a defendant who had innocently suffered much from the arrest of his vessel by the plaintiff, under a mistake. Their Lordships declined, because the plaintiff had acted bonâ fide with probable cause, and without crassa negligentia, having had reason to suspect that the defendant's vessel was one which had run his own vessel down, and got away in the night.

The present case is different. The plaintiffs had full knowledge of the facts, and must be held to the legal effect of their own engagements. If they had regarded the terms of those engagements, they would have known they had no right to arrest the vessel. Add to this, the arrest of the vessel by the plaintiffs was made on the eve of commencing a profitable voyage, and after a decision of the magistrate adverse to their claim, and the plaintiffs have attempted to support the proceeding by making charges of fraud against the defendant, which they have quite failed to prove. I think this is a case for damages. I therefore order the release of this vessel, and condemn the plaintiffs in costs and damages; the amount of damages to be estimated in the usual way, by the registrar and merchants.

Solicitor for plaintiffs: *John Wills.*

Solicitors for defendants: *Cotterills & Son.*

(1) Sw. 378.

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Jan. 22.

THE GOLONDRINA.

Salvage—Amount—Distribution.

SALVAGE. The ship *Grenada*, 684 tons register, bound from Singapore to Liverpool with a general cargo, fell in, when about four days sail from Chili, with the barque *Golondrina*, 475 tons register, laden with a cargo of copper regulus, bound from Chanaval, in Chili, for Swansea, and in distress, her first and second mate having deserted her previous to her departure from Chanaval, and her master having jumped overboard in a deranged state of mind from drinking.

At the request of the crew of the *Golondrina*, the master of the *Grenada* put on board her his second mate, who, after great difficulty, brought the *Golondrina* safely into Swansea.

Value of the property saved 26,000*l.*

Dr. Spinks, Q.C., and *Dr. Tristram*, for the *Grenada*.
Lewers, for the *Golondrina*.
Lushington, for the owners of the cargo.

The Court awarded to the salvors 1800*l.*; 1000*l.* to the owners; 300*l.* to the second mate; 200*l.* to the master; and 300*l.* to the crew, to be distributed according to their ratings.

Solicitor for salvors: *Nation*.
Proctors for defendants: *Clarkson, Son, & Cooper*.

THE MARY OR ALEXANDRA.

1867
March 5.

Cause of Possession—Plaintiffs beyond the Jurisdiction of the Court—Security for Damages.

Plaintiffs beyond the jurisdiction of the Court, in a cause of possession, though liable to give security for costs, will not be required, as a general rule, to give security for damages.

THIS was a cause of possession instituted by the United States of America. The case came before the Court on a motion by the defendant, the registered owner of the *Alexandra*, that the plaintiffs should give security for costs and damages. The vessel had been arrested on an affidavit that she was the property of the United States.

An affidavit had been filed by Mr. Prioleau, the defendant, that he had good grounds of defence on the merits.

Feb. 26. *Milward, Q.C.*, and *Butt*, in support of the motion.

The Admiralty Advocate, Brett, Q.C., and *Clarkson*, for the plaintiffs. By the ordinary practice of the Court security for damages is not given in causes of possession: the *D. H. Peri.* (1) No exceptional circumstances have been shewn in this case to induce the Court to depart from the ordinary practice.

DR. LUSHINGTON. I shall order security for costs to be given. As to security for damages, the whole question is in such a state of doubt that I shall take time to consider.

Cur. adv. vult.

March 5. DR. LUSHINGTON. This is a cause of possession by the United States. The defendant moves that the plaintiffs may give security for costs and damages. The plaintiffs do not dispute that they are liable to give security so far as costs are concerned: the question is as to damages.

On behalf of the defendant it is argued that this being a cause of possession, in which, by the practice of the Court, the vessel is not released on bail, damages must accrue to them from the institution of the cause, that is, supposing the cause to have been improperly instituted; that the reasons for requiring a plaintiff

(1) Lush. 543.

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out of the jurisdiction to give security for costs apply à fortiori to his giving security for damages; and I was referred also to what was stated to be the practice of the Court of Chancery in the granting of injunctions. I do not deny that there is force in these arguments; but, on the other hand, it has not been the practice of this Court to require from a foreign plaintiff security for damages: the *D. H. Peri.* (1) I must decline to change in a particular case the settled practice of the Court, least of all in a case like the present, where there is no reason to suspect the solvency or good faith of the plaintiffs.

I refuse, therefore, so much of the motion as refers to security for damages.

Proctors for plaintiffs: *Rothery & Co.*

Attorneys for defendant: *Gregory & Rowcliffes.*

March 5.

THE JEUNE PAUL.

Salvage Services rendered within the Boundaries of the Cinque Ports—1 & 2 *Geo.* 4, *c.* 76—*Concurrent Jurisdiction of the High Court of Admiralty*—17 & 18 *Vict. c.* 104, *s.* 460; 25 & 26 *Vict. c.* 63, *s.* 49.

3 W. R. 503.

The general words in the 49th section of the Merchant Shipping Act Amendment Act, 1862, which extends the provisions of the 460th section of the Merchant Shipping Act, 1854 (giving summary jurisdiction to two justices in salvage suits), to *all* cases in which the value of the property saved does not exceed 1000*l.*, refer to the latter part of the 460th section, which provides for cases only where "the sum claimed does not exceed 200*l.*," and occurring in the United Kingdom "elsewhere than within the boundaries of the Cinque Ports;" and do not refer to the earlier part of that section, which provides that "disputes with respect to salvage arising within the boundaries of the Cinque Ports shall be determined in the manner in which the same have hitherto been determined."

The concurrent jurisdiction, therefore, of the High Court of Admiralty with the Court of Admiralty of the Cinque Ports and the commissioners appointed by the Lord Warden under the statute 1 & 2 Geo. 4, c. 76, over salvage causes arising within the boundaries of the Cinque Ports, is not affected by the Merchant Shipping Act Amendment Act, 1862.

THIS was a cause of salvage for services rendered by the steam-tug *Champion* to the brigantine *Jeune Paul*, within the boundaries of the Cinque Ports.

(1) Lush. 543.

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THE JEUNE PAUL.

On the 9th of January, 1867, the *Jeune Paul* got ashore off Dungeness. The master and crew left the vessel in their boat, and were picked up by the Cinque Ports pilot cutter, which afterwards fell in with the *Jeune Paul*, and took possession of her, and engaged the *Champion* to tow her into Dover.

The defendants, the owners of the ship and cargo, moved to be dismissed from the suit on the ground that under the circumstances the Court had no jurisdiction; and filed affidavits shewing that the value of the ship was 321*l.*, and the value of the cargo 137*l.* 15*s.* = 458*l.* 15*s.* The question turned upon the following sections of the Merchant Shipping Acts:—

17 & 18 Vict. c. 104, s. 460: "Disputes with respect to salvage arising within the boundaries of the Cinque Ports shall be determined in the manner in which the same have hitherto been determined; but whenever any dispute arises elsewhere in the United Kingdom between the owners of any such ship, boat, cargo, apparel, or wreck, as aforesaid and the salvors as to the amount of salvage, and the parties to the dispute cannot agree as to the settlement thereof by arbitration or otherwise, then if the sum claimed does not exceed two hundred pounds, such dispute shall be referred to the arbitration of any two justices of the peace," &c.

25 & 26 Vict. c. 63, s. 49: "The provisions contained in the eighth part of the principal act for giving summary jurisdiction to two justices in salvage cases, and for preventing unnecessary appeals and litigation in such cases, shall be amended as follows; (that is to say)

1. Such provisions shall extend to all cases in which the value of the property saved does not exceed 1000*l.*, as well as to the cases provided for by the principal act:

2. Such provisions shall be held to apply whether the salvage service has been rendered within the limits of the United Kingdom or not."

Feb. 26. *Cohen*, in support of the motion. The question is whether the Admiralty Court has jurisdiction where salvage services have been rendered within the limits of the United Kingdom, and the value of the property saved is less than 1000*l.* The fair construction of the 49th section of the Merchant Shipping Act

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Amendment Act is, that the jurisdiction of the Admiralty Court is excluded where the property is of less value than 1000*l.*

E. C. Clarkson, contrà. This salvage service was rendered within the boundaries of the Cinque Ports. In the *Maria Luisa* (1), it was determined that the concurrent jurisdiction of the Court of Admiralty with the jurisdiction of the Cinque Ports was unaltered by the 460th section of the Merchant Shipping Act, 1854.

The provisions contained in that section, giving jurisdiction to the justices, apply only to cases of salvage elsewhere than in the Cinque Ports. Those provisions are by the Merchant Shipping Act Amendment Act, 1862, extended to all cases under 1000*l.*, but the earlier part of the 460th section of the principal act is left unrepealed. The Court of Admiralty has, therefore, still concurrent jurisdiction with the Cinque Ports.

Cur. adv. vult.

March 5. DR. LUSHINGTON. The question depends upon the joint operation of the Merchant Shipping Acts. Previous to the 1 & 2 Geo. 4, c. 76, in the case of salvage services rendered within the boundaries of the Cinque Ports, this Court had concurrent jurisdiction with the Court of Admiralty of the Cinque Ports. The statute 1 & 2 Geo. 4, c. 76, conferred a further jurisdiction upon commissioners appointed by the Lord Warden. In 1854, the Merchant Shipping Act was passed, and the repealing act which accompanied it repealed the statute 1 & 2 Geo. 4, c. 76, except certain sections which are expressly excepted, and which maintain the jurisdiction of the commissioners. The 460th section of the Merchant Shipping Act (which occurs in part 8 of the act) commences by providing that "disputes with respect to salvage arising within the boundaries of the Cinque Ports shall be determined in the manner in which the same have hitherto been determined;" the effect of which is to leave concurrent jurisdiction in this Court and in the Court of Admiralty of the Cinque Ports, and the commissioners appointed by the Lord Warden. And so the Court held in the case of the *Maria Luisa*. (1) The same

(1) Swabey, 67.

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460th section proceeded to give an exclusive jurisdiction to justices in case of any salvage dispute arising elsewhere (than within the boundaries of the Cinque Ports) in the United Kingdom, if the sum claimed did not exceed 200*l.* In 1862, the Merchant Shipping Amendment Act was passed, the 49th section of which is as follows:—[His Lordship read the section above set out, and continued] Now the Court has held, that in the cases to which this section applies, the justices are invested with an exclusive jurisdiction. It is now contended, on behalf of the defendants, that the words of the section are quite general (which is true); that they apply to cases within the Cinque Ports, and therefore that the jurisdiction of this Court is ousted. But if this reasoning is good, then, although different considerations of policy might apply, it would follow that the jurisdiction of the Court of Admiralty of the Cinque Ports, and of the commissioners appointed by the Lord Warden, is ousted also. But this is clearly not so; for the sections of 1 & 2 Geo. 4, c. 76, left unrepealed by the Merchant Shipping Act, are not to be found in the schedule of statutory provisions repealed by the Merchant Shipping Amendment Act.

Moreover, I am satisfied that the general words used in the 49th section of the amending act, namely, that the provisions shall extend to *all* cases in which the value of the property saved does not exceed 1000*l.*, and shall apply whether the salvage services have been rendered within the limits of the United Kingdom or not, refer to the latter part of the 460th section of the principal act, in which provision had been made only for cases where the sum claimed did not exceed 200*l.*, and for cases occurring *in the United Kingdom* elsewhere than within the boundaries of the Cinque Ports; and do not refer to the earlier part of the 460th section, which provided that "disputes with respect to salvage arising within the boundaries of the Cinque Ports should be determined in the manner in which the same had hitherto been determined."

I am of opinion, therefore, that the Merchant Shipping Amendment Act leaves untouched the concurrent jurisdiction of this Court over salvage cases like the present, arising within the boundaries of the Cinque Ports. And this being so, I do not hold myself at

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liberty to entertain considerations of the policy of ousting the jurisdiction of this Court in trifling cases. I refuse this motion, with costs.

Proctors for plaintiffs: *Clarkson, Son, & Cooper.*
Proctors for defendants: *Deacon, Son, & Rogers.*

April 16.

THE STELLA.

Salvage—Value of Property at the Time of rendering the Service—25 & 26 Vict. c. 63, s. 49.

The words in the 49th section of the Merchant Shipping Act Amendment Act, 1862, determining the jurisdiction of the Court by the value of the property saved, mean the value of the property when first brought into safety by the salvors, and not its value at any subsequent period.

THIS was a motion by the defendants, the owners of the *Stella* and her cargo, in a salvage cause for dismissal of suit, on the ground that the value of the property saved was less than 1000*l.*, and therefore that, under the 49th section of the Merchant Shipping Act Amendment Act (25 & 26 Vict. c. 63), the Court had no jurisdiction.

That section is as follows: "The provisions contained in the eighth part of the principal act for giving summary jurisdiction to two justices in salvage cases, and for preventing unnecessary appeals and litigation in such cases, shall be amended as follows (that is to say),

1. Such provision shall extend to all cases in which the value of the property saved does not exceed one thousand pounds, as well as to the cases provided for by the principal act."

The facts of the case are fully stated in the judgment.

March 19. *Dr. Deane, Q.C.*, in support of the motion.
E. C. Clarkson, for the salvors.

Cur. adv. vult.

April 16. DR. LUSHINGTON. The *Stella* is a Norwegian vessel, of 276 tons burden, and was bound for the port of London, laden with a cargo of timber.

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On the 21st of November she struck on the Sunk Sand, and was assisted by the plaintiffs in the cause into Harwich Harbour. On the same day, under the direction of Mr. Groom, the Norwegian Vice-Consul at Harwich, she was berthed on the beach. Possession was taken of the ship and cargo by Mr. Groom's firm, who acted as the ship's agents. Neither party availed themselves of the power given by the 50th section of the Merchant Shipping Act Amendment Act (25 & 26 Vict. c. 63) to have the property valued by the Receiver of wreck. On the 26th of November the defendants' proctors wrote to the proctors of the plaintiffs informing them that they had given bail for ship's cargo and freight. In point of fact, the suit at that time had not been instituted. It was not instituted till two days afterwards, the 28th of November. On the next day, the 29th of November, an appearance—an absolute appearance—was entered on behalf of the defendants, the owners of the ship and cargo. It was found impossible to get the vessel afloat again, and accordingly, the vessel still lying on the beach, the cargo was discharged into barges and brought round into London, and there sold on the 22nd of February. The defendants insist that the value of the property saved is under 1000*l.*, and would prove it in the following manner:—The gross freight was 286*l.* 13*s.*, but this was reduced to 134*l.* 9*s.* 8*d.* in consequence of the expenses of discharging the cargo and conveying it to London. The cargo, when sold in London on the 23rd of February, produced in the gross 508*l.* 6*s.* 2*d.*, but the net proceeds amounted only to 27*l.* 15*s.* 4*d.*; and lastly, Mr. Vaux, a shipbuilder of Harwich, valued the vessel on the 28th of February at 150*l.* This would make the total of ship's freight and cargo under 320*l.*

On the other hand, the plaintiffs contend that the vessel, cargo, and freight upon the arrival of the vessel at Harwich were worth more than 1000*l.*; and that if now they are worth less, this depreciation is due to the subsequent mismanagement and delay of the defendants. The plaintiffs call attention to the fact that the vessel was insured in the sum of 1500*l.*, and they would make use of the preliminary offer of bail by the defendants as an admission by them that the case fell within the jurisdiction of the Court, and therefore that the value of the property saved amounted to 1000*l.* Their principal witness was Mr. Wates, a shipowner of Harwich,

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who was the contractor for conveying the cargo to London. He deposes that there was great and unnecessary delay in getting the cargo out of the vessel; that the vessel was most improperly berthed, and sustained considerable damage whilst lying at Harwich; that at the time the vessel was brought into Harwich Harbour with her cargo and stores she was worth at least 1000*l.*, and that he would most readily have given that sum for her; that had the vessel been laid where she would have floated at spring tides, she might have been taken alongside the quay or near thereto at Harwich, and discharged her cargo, or have been towed to London for 50*l.* or less; and that had the cargo been discharged when first brought in and sold at Harwich, it would have realised a considerable sum over and above 508*l.* 6*s.* 2*d.* This evidence is corroborated by John Vaux, the shipbuilder (who had surveyed the vessel on the beach at Harwich on the 28th of February, and estimated her to be worth 150*l.*), to the extent that the vessel must have received considerable damage by lying so long on the beach, and that a great saving might have been effected if she had been laid alongside the ship yard and repaired. It is also corroborated by Joseph Meachen, who was employed with his vessel in conveying the cargo to London; and by Thomas Adams, a smack owner, who deposes that he surveyed the vessel when she came into Harwich in November, and again in February, and found on the second occasion that she had suffered much injury in the interval; he also says that when she was first brought into Harwich she was worth at least 600*l.* The clerk to the plaintiffs' proctors also deposes that he was in November informed by the ship's agents in Harwich, that the value of the cargo when shipped at Drammen was 560*l.* It may be difficult to balance this conflicting evidence, but on the whole I am of opinion:—

First, that the burden of proof is upon the defendants, who undertake to shew that the Court has not jurisdiction over this case; and, secondly, that upon a review of their evidence, the defendants have failed to establish that the value of the property saved did not exceed the sum of 1000*l.*

It is obvious that the statute, in appointing the value of the property saved to be the condition determining the Court's jurisdiction, means the value of the property when first brought into

safety by the salvors, and not at any subsequent period. In the present case that date was the 21st of November, and looking to that date, and to what then took place, I think that both the parties treated the value of the property as clearly over 1000*l.*

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I should, therefore, be wrong in considering that the value was then less than that sum, especially as explanation is offered of a subsequent depreciation.

The motion must be dismissed with costs.

Proctors for plaintiffs: *Shephard & Skipwith.*
Proctors for defendants: *Deacon, Son, & Rogers.*

[IN THE ARCHES COURT.]

May 4.

RUGG *v.* KINGSMILL.

Faculty, Grant of, to Bury in a Vault in Private Grounds—Consecration—Jurisdiction of Consistorial Court.

The Consistorial Court of Winchester decreed a grant of a faculty to bury in a family vault under the chancel of a church standing in the private grounds of the applicant, the entrance to the vault being only from without the building, and the approach to it being on unconsecrated ground. The vault had been made under an old chapel, in which divine service had been performed from a very early period; the chapel had been pulled down, and on its site the church had been erected, and duly consecrated:—

Held, on appeal, that the constant performance of divine service in the chapel raised primâ facie the presumption that the chapel had been consecrated, and therefore that the jurisdiction of the Consistorial Court attached upon it;

That the consecration of a church or chapel extends to the vaults beneath;

That it is not necessary that the officiating clergyman should stand on consecrated ground while performing the burial service.

2 Lee. 250

2 P.C. 455

affd [illegible] upon condition 2 P.C. 59

THIS was an appeal from a decree pronounced in the Consistorial Court of Winchester, granting an application by William Howley Kingsmill, to have a faculty granted to him, appropriating and confirming a family vault underneath the chancel of the church at Sydmonton, in the county of Southampton.

The grant of the faculty was opposed by the Rev. Lewis Rugg, perpetual curate of Echinswell with Sydmonton.

The question having been argued by counsel on both sides, before the chancellor of the diocese of Winchester, he delivered

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(24th of August, 1866) the following judgment, in which the facts of the case are fully stated:—

The petitioner is the owner and occupier of a mansion house and considerable estate called Sydmonton Court, in the parish of Sydmonton, and lay impropriator of the great tithes of the parish. The vault in question was built some years since by the father of the petitioner, then the owner of Sydmonton Court and since deceased, under and of the same dimensions as the chancel of Sydmonton church. Since the hearing of the cause I have been furnished with a plan shewing the exact dimensions of the vault, from which it appears to be fifteen feet long within the walls by nine feet wide. In height it is six feet four inches to the spring of the arch, and seven feet ten inches to the centre. It is approached by a flight of steps leading from the grounds of the petitioner, in which the church stands, and thence entered by an external door. Since the making of the vault, the old church of Sydmonton has been taken down and a new church built on the same site, which was consecrated last year for the "celebration of divine offices." It does not appear that the vault was in any way interfered with or disturbed by the new buildings, and the contrary must be taken to be the fact.

Sydmonton and the adjoining parish of Echinswell were formerly, though for civil purposes parishes, for ecclesiastical purposes chapelries, attached to Kingsclere. In the year 1852 they were, by an order in council, "separated from Kingsclere and united so as to form together a separate parish for ecclesiastical purposes, and a perpetual curacy by the name or style of the perpetual curacy of Echinswell with Sydmonton." The order provided that baptisms, churchings, marriages, and burials should be solemnized and performed within the proposed parish and benefice in each of the churches or chapels therein. There is not, and there never has been, any burial ground surrounding or attached to Sydmonton church, but the inhabitants of Sydmonton have always been buried at Echinswell. Sydmonton church stands in the private grounds of Sydmonton Court, of which, as before stated, Mr. Kingsmill is the owner. The above appear to be the facts material to the formation of a judgment in the case.

It was argued by Dr. Swabey, on the part of the petitioner,

that as the principal proprietor and inhabitant of the parish and lay impropriator of the tithes, and primâ facie liable to repair the chancel, he was entitled to the faculty prayed, unless indeed the Court was prepared to lay down a rule prohibiting all intramural interments.

On the other hand, Dr. Twiss and Dr. Tristram, for Mr. Rugg, contended that the faculty for the vault ought not to issue for several reasons. The competency of the Court to grant the faculty was questioned. As has been already stated, no burials have hitherto taken place at Sydmonton, and a doubt was expressed whether the ancient chapel at Sydmonton was ever consecrated, and was not, in fact, a mere oratory. In the absence, however, of any evidence, I cannot assume this, but must presume the contrary to be the fact. Then the vault is said to have been constructed by the late Mr. Kingsmill without a faculty—a defect which seemed to be put as equivalent to the want of consecration. The want of a faculty, however, though undoubtedly an irregularity, and one that necessitates the present proceeding, does not alter the character of the building. Vaults must be erected on consecrated ground, but do not themselves require consecration; and the vault in question is clearly a part either of the old church or of the modern building, and, therefore, on consecrated ground.

It was further argued that a faculty cannot confer a right to bury where no such right previously existed, but can only limit to one person a right previously shared by him with others, and that the inhabitants of Sydmonton, and amongst them Mr. Kingsmill's family, have no right of burial at Sydmonton. This, however, is, I think, not a correct statement. The inhabitants of a parish have a common law right to be buried in the parish of which they are inhabitants, provided there is a burial ground available therein; but they have no common law right to be buried within the chancel, and probably not within the church, and a faculty for a vault within the building, and certainly within the chancel, must always confer on the grantee a right which he did not before possess. I am further of opinion that the right of the inhabitants of Sydmonton to be buried in the parish is not now existent, but dormant, and in abeyance until a burial ground is provided, if that time shall ever arrive.

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It was contended, assuming the Court to be competent to grant the faculty, that it ought not in the due exercise of its discretion to do so, because the entrance to the vault being in Mr. Kingsmill's private grounds, Mr. Kingsmill may exclude the public from attending, and even the incumbent from performing the burial service. But I question whether the solemnization of a funeral is of necessity open to all the parishioners. There are many instances of private burial grounds, military and others, from which the public undoubtedly may be excluded. And with regard to the incumbent, as none but he would have a right to read the service on the occasion of a burial in the vault, so it cannot be supposed that the very person desiring the solemnization of a burial would deny to him, or some one authorized by him, that access, without which the rites could not be celebrated.

It was also urged as an objection that the incumbent may be compelled to read a part of the service on unconsecrated ground. The dimensions of the vault, however, are such that I do not see the necessity for this, if Mr. Rugg entertains a conscientious objection to do so. Even if there be such a necessity, I am far from thinking it a conclusive reason against the faculty. I am not aware of any valid objection to the reading of any part of the services contained in the Book of Common Prayer on unconsecrated ground. At the end of the preface "concerning the services of the church," all priests and deacons are enjoined "to say daily the morning and evening prayer, either privately or openly." If privately, which Wheatley interprets to mean "in the family where he lives," of course not on consecrated ground. So the services for private baptism, the visitation and communion of the sick, are, and that for the solemnization of matrimony may be, celebrated in unconsecrated ground. And with regard to the burial service itself, it not unfrequently happens in cemeteries common to the church and dissenters, that the approach to the consecrated chapel is on common and therefore unconsecrated ground, and that the body is here met and the preliminary sentences read by the officiating minister.

Again, the faculty was objected to on the general ground of the discouragement now commonly given to all burials in a church or chancel, and in support of this view the case of *Rich* v. *Bush-*

nell (1), and the report of the Church Commissioners in 1832 were cited. Doubtless this report is entitled to respect, but it is to be remarked that the condemnation of the commissioners was especially directed against vaults entered from within the church. Moreover, the legislature, so far from adopting their conclusions in an unqualified manner, has even thought fit to reserve the right, with the consent of the Secretary of State, to bury in vaults in or under any church or chapel in cases where burials otherwise are prohibited: 16 & 17 Vict. c. 134, s. 4. With regard also to *Rich* v. *Bushnell* (2), Sir John Nicholl's observations were obviously directed against vaults entered from within the building, and he moreover intimated that even under such circumstances the faculty might in some cases issue. The statute 11 & 12 Vict. c. 63, s. 83 (the Public Health Act), prohibits the making of vaults under churches built in any district in which that act is in force, but that is a prohibition which can only apply to populous places, the Public Health Act not being capable of being put in force in a small parish such as Sydmonton.

I have now mentioned all the objections which were urged against the faculty, and after giving the best consideration in my power to the arguments on both sides, I have come to the conclusion that the faculty ought to issue.

Mr. Kingsmill, as principal inhabitant of the parish and owner of the great tithes and chancel, comes before the Court, to use the words of Sir John Nicholl in *Rich* v. *Bushnell* (2), in as favourable circumstances as possible; and the conditions pointed out by the legislature having been observed in the construction of the vault, it being arched and entered only from without the building, I see no reason for supposing that the few interments which in the ordinary course of nature may be expected to take place there can be in the smallest degree detrimental to health.

The Court, therefore, directs that the faculty shall issue as prayed, but inasmuch as there is some novelty in the case, and as the necessity for this application has arisen from the fact of the vault having been originally constructed without lawful authority, costs will not be given.

From this decree Mr. Rugg appealed.

(1) 4 Hagg. Eccl. 164. (2) 4 Hagg. Eccl. 172.

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March 2. *The Admiralty Advocate* (*Dr. Twiss, Q.C.*), and *Dr. Tristram*, for the appellant. The chancellor of Winchester had no jurisdiction to grant a faculty. The parishioners had no right of burial in the church of Sydmonton; there was no marriage register. Consecration of the church does not also consecrate the vault beneath. There are instances of consecrating chapels over wine vaults, &c. Can it be said that such consecration so affects the ground below as to fit it for burials? There is no proof of the consecration of the vault, but Mr. Kingsmill asks that he may bury in the vault, and that the clergyman be bound to perform the service. Can the Court grant this without the consent of the incumbent? In *Rich* v. *Bushnell* (1) it was thought that the incumbent had not an absolute veto. If Mr. Kingsmill is the owner of this vault within his own property, it must be consecrated before he can bury there; if not his property, he has no right of burial as a parishioner. If it is consecrated as a part of the church, then Mr. Kingsmill has no right of burial to the exclusion of all the world besides. This vault is in private property, and it is impossible for the parson to read the burial service which, by the statute of uniformity, 13 & 14 Ch. 2, c. 4, is a public service, on consecrated ground. The chancellor of Winchester felt this difficulty, and in his judgment tried to get rid of it. The doctrine that the public might be excluded is novel, and is contrary to custom and law. If the Court grants the faculty at all, it should be under some conditions.

Dr. Deane, Q.C., and *Dr. Swabey*, for Mr. Kingsmill. There is no statute which prevents the making of new vaults; therefore the local ordinary having granted the faculty, this Court will uphold it if not contrary to law. Why should not the clergyman read the service in the vault? It is said he cannot bury there, because the approach is on unconsecrated ground, and that the order for the burial of the dead could not be complied with; but the whole form of the burial service is inconsistent with burying in vaults at all, for the service only contemplates burial in a churchyard. The clergyman can meet the body at the door of the church, and then he can walk from the door of the church to the door of the vault, and read part of the service in the church and part in the vault.

(1) 4 Hagg. Eccl. 164.

If the vault is dark, he can read by a candle, which is no more than is necessary in many churches, where the windows are so dark that, except on a bright day, candles are necessary. The plaintiff admits that all persons should have access to the service: as many may go to the vault as the vault will hold.

The Admiralty Advocate replied.

Cur. adv. vult.

May 4. DR. LUSHINGTON. Before I proceed to the particular circumstances of this case, I must repeat what has often been said by my predecessors, that a faculty of this description granted by the local authority ought not to be impeached, save upon very clear and decided reasons: either that the grant was illegal, or detrimental to the interests of those whose interests the Court was bound to protect.

It is not alleged in this case that the granting of this faculty is prohibited by any of the recent acts of parliament—acts passed with regard to burials generally—but it is alleged for other reasons that the grant of this faculty was illegal, and further, that great "inconveniences," to use the mildest description, would arise when the faculty came to be acted upon.

It appears that the present applicant for the faculty, Mr. William Kingsmill, is the possessor of a considerable estate called Sydmonton Court, and the owner and occupier of a mansion therein. The district of Sydmonton itself was part of the parish of Kingsclere, and in Sydmonton there was a building called the parish church, more properly speaking a chapel of ease to the church of Kingsclere; under the Church Building Acts, however, Sydmonton was separated from Kingsclere for ecclesiastical purposes; and some years ago, I believe about the year 1849, this old chapel was pulled down by William Kingsmill, the father of the present applicant, and a new church erected in its place: this he did at his own expense. This new church was subsequently (three or four years since) consecrated by the present Bishop of Winchester, Mr. Rugg violently opposing such consecration.

Now as to the vault in question, it was made ten years before the old chapel was pulled down, and it appears to have been under the chancel of the old chapel, and conterminous with it. This

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ancient chapel and the new church, which I apprehend is built upon the same site, is situated within the grounds of Mr. Kingsmill. There was no churchyard, and no burials, as far as appears, were ever performed there.

The first objection appears to be, that the Consistory Court at Winchester had no jurisdiction over the subject matter, because the original chapel at Sydmonton was not consecrated, and that the consecration of the new chapel did not extend to this vault. Now, certainly, to determine with perfect confidence, whether the ancient chapel was consecrated or not, is a question which would require much more evidence than has been attempted by either side in this case; but I must take the case as I find it. Then, the facts are simple enough, and they are these: that from very ancient times, divine service was performed in this chapel, and there is no evidence that any burial was ever performed, for the very obvious reason that there was no churchyard.

Now, assuming these facts as a substratum for my judgment, I am of opinion that the constant performance of divine service from a very early period, raises primâ facie the presumption that this ancient chapel was consecrated. It is not at all necessary to establish consecration, that either marriages should be solemnized or burials performed; if, indeed, the chapel was not consecrated, serious inconvenience might follow: a great doubt might arise as to the person in whom the right of property might be vested; then, assuming the chapel to be consecrated, I think there can be no doubt but that consecration extended not only to that which was above ground, but to that which was under the building.

But to take another view of this case, the new chapel as it stands has been consecrated by the Bishop of Winchester. I have heard no argument to satisfy my mind that this consecration is not valid, and that it does not operate upon the vault itself, as well as upon the building above the vault.

In whatever way I view this case, therefore, I must consider the locus in quo was consecrated, and consequently that the jurisdiction of the Consistorial Court of Winchester attached upon it. The argument, therefore, of want of jurisdiction falls to the ground.

Another objection has been raised against the grant of this faculty, and it is certainly one of a peculiar nature—it is this, that

the church and vaults are situate within the grounds of Mr. Kingsmill, and that, consequently, as the grounds are unconsecrated, two difficulties might arise: First, that possibly persons attending the funeral, being in the grounds the private property of Mr. Kingsmill, unless with his special leave, would be trespassers, assuming that all funerals ought to be open to the public; secondly, that the officiating clergyman must either enter the vault to perform the funeral service, which would be inconvenient, or must stand upon unconsecrated ground when he reads the service.

Now certainly these objections may have some foundation in fact, but the question for my solution is, whether they are of so serious a nature as to operate upon my mind so as to induce me to reverse the decree of the Court below.

As to the first objection, and assuming that all funerals ought to be open to the public, I strongly incline to the opinion that the taking this faculty would have the effect of preventing persons attending funerals in pursuance of the faculty from becoming trespassers, and moreover it appears to me that though such an occurrence is possible, that persons might improperly obtrude themselves upon the performance of the funeral, yet it is too improbable an event to operate with any weight upon the mind of the Court. With regard to the second objection, that the clergyman must stand upon unconsecrated ground whilst reading the service, I think, assuming that he does not think it proper to enter into the vault, that it is not entitled to any weight.

I should be sorry that any word should drop from me that could be understood to speak lightly of the effects of consecration, but it really does appear to me that the argument raised in this case would attribute to consecration effects which, to say the least of it, would be most unreasonable. The main objects of consecration are to secure the church or the burial ground for divine service and funeral rites, and to prevent anything being done which can interfere with those objects, or tend to cause umbrage to the parishioners; but to say that where there is a consecrated vault, and where there is no churchyard, and where there is a clergyman standing within half a yard of consecrated ground, on a strip of ground that is not consecrated, and there reading the service, it is

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either illegal or indecorous or calculated to give offence, is a proposition utterly unfounded, and which I think never could be maintained.

I readily admit that vaults inside churches generally ought not to receive the sanction of the Ecclesiastical Court, most especially if the entrance to those vaults is within the church, but here is a vault in a remote country parish, which is under the chancel, and the entrance to which is outside the church itself; as relates to the locality, I cannot conceive that any circumstances could exist shewing that the use of that vault when consecrated would be objectionable.

With respect to the applicant himself, I think he has a very strong claim to the indulgent consideration of the Court; his father has been a great benefactor to the parish; he built the new church himself; the son inherited a considerable property in the parish, and is a resident there; he is also an appropriator of the great tithes, though upon that circumstance I place little reliance.

Looking at all these facts, I have to consider whether from the grant of this faculty any probable detriment could arise to the parishioners, or any one else, and I am unable to discover any. The number of funerals must necessarily be few, the bodies will never be carried into the church; there is almost an absolute certainty that no possible risk can arise.

It remains, however, to consider who it is that has raised an objection to the grant of this faculty, and has brought this appeal. It is the incumbent of the parish, and if I am to judge from the proceedings in this case, the questions which I have been discussing and the possible objections never entered into the mind of this reverend gentleman; they are the offspring of the learning and ingenuity of the counsel employed, but I abstain from discussing them further. The incumbent has clearly no right of veto in a case of this description, but his arguments against the grant of a faculty, either on the ground of injury to himself or damage to the public, ought always to receive respectful attention from the Court.

I do not perceive how his individual interest can be affected by the grant of this faculty; whatever fees he was entitled to by law will remain entirely unprejudiced by the consecration of this vault.

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I think the reverend gentleman has failed in shewing good cause against the grant of this faculty, and I am further of opinion that the judgment pronounced by the chancellor of the diocese of Winchester is perfectly consistent with law, very clear, and very careful. I think the case ought not to have come up to this Court, and that it is my duty to affirm the decree of the Court below with costs.

Proctors for Mr. Rugg: *Brooks & Dubois.*
Proctors for Mr. Kingsmill: *Rothery & Co.*

THE SCIO.

April 16.

Mortgagees—Material Men—Possessory Lien—Priority.

Mortgagees of a ship are entitled to payment in priority to material men who at the time of supplying the materials were not in such actual possession of the ship as to give them a possessory lien over her.

IN the month of June, 1865, 8-64th shares of the *Scio*, a British vessel, were mortgaged to John Douthwaite, to secure 62*l.*; and in July, 40-64th shares were mortgaged to James Young, to secure 300*l.*

In January following (1866), the *Scio* put into Lowestoft harbour in a disabled condition; and from that time until June following she remained there, undergoing repairs. The persons who executed the repairs and supplied the necessary materials were Mr. Hutchison, shipbuilder, and Mr. Rounce, whose firm were the authorized shipping agents for the club at Scarborough in which the vessel was insured. The owner of the vessel was insolvent, and early in June, Mr. Douthwaite, as one of the mortgagees, went down to Lowestoft to take possession of the vessel, and proposed to remove her without paying the debts which had been incurred on the repairs of the vessel. A dispute thereupon arose between him and the master. On the 16th of June the master instituted a suit (No. 3341) to recover his wages and disbursements, and arrested the vessel and also the cargo for freight. On the 18th, Messrs. Hutchison & Rounce instituted another

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suit (No. 3343) to recover their debts, under the 4th section of the Admiralty Court Act, 1861 (24 Vict. c. 10) which is as follows:—"The High Court of Admiralty shall have jurisdiction over any claim for the building, equipping, or repairing of any ship, if at the time of the institution of the cause the ship or the proceeds thereof are under arrest of the Court."

The owner of the vessel did not appear, but both suits were defended by the mortgagees, Messrs. Douthwaite and Young. The vessel had been sold under order of the Court: the net proceeds of the vessel and freight amounted to 455*l.*, whilst the total of the claims against them exceeded 1000*l.*, as follows:—

				£	s.	d.
Master				174	1	10
Hutchison, for repairs	£289	5	3			
Rounce and others, do.	267	0	0			
				556	5	3
J. Young, mortgagee, exclusive of interest	300	0	0			
J. Douthwaite, do. .	62	0	0			
				362	0	0
Total . .				£1092	7	1

Under these circumstances, the mortgagees, Messrs. Young and Douthwaite, in November last, moved in the suit, No. 3341, to have their mortgage debts, &c., paid out of the proceeds, in priority to any payment to Messrs. Hutchison & Rounce who had supplied the repairs and materials to the vessel, and who were the plaintiffs in the suit No. 3343. The Court directed the motions to stand over until a statement of the facts relative to the question in dispute should have been filed. The parties failed to carry out this order; but, instead of a statement, a number of conflicting affidavits had been filed.

April 16. *Bayford*, on behalf of the mortgagees. Hutchison had no material lien on the ship. There was an abandonment of lien. *The Pacific* (1) governs this case.

(1) Brow. & Lush. 243, 9 Jur. N.S. 1110

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Dr. Deane, Q.C., for the material men, argued that there was no abandonment or waiver of lien.

DR. LUSHINGTON [after stating the facts as above]. It might have been more satisfactory to have had an act on petition in this case; but considering the small value of the property at stake, and the expenses already incurred in litigation concerning it, I am willing to decide the case upon these affidavits if they furnish the necessary materials for a judgment.

As between the mortgagees and the master there is no dispute as to priority. The question is as between the mortgagees and those who repaired and refitted the vessel. If these men had simply supplied materials to the vessel, then, as established in the *Pacific* (1), their right in rem to the proceeds of this vessel and freight commenced only upon the institution of their suit in June last, and consequently would be posterior to the right of the mortgagees, whose mortgages were registered in the months of June and September, 1865. If, on the contrary, the vessel at the date of her arrest was in the actual possession of the shipbuilder, Mr. Hutchison, then by common law he would have a possessory lien upon her which could not be displaced by the mortgagees: *Williams* v. *Allsup*. (2) Now Mr. Rounce was never in possession of the vessel. He was the agent of the underwriters, and he and those persons whom he represents, seem to have done no more than advance money and supply rope, ironwork, provisions, &c., for the repairing and equipping of the vessel.

The case of Mr. Hutchison the shipbuilder is somewhat different. When he commenced the repairs on the *Scio*, she was lying in the graving dock, on the north side of Lowestoft harbour; she was then removed to the south side of the harbour for the purpose of again taking in part of her cargo which had been previously discharged there, and Mr. Hutchison continued to repair her whilst lying there; subsequently she was again moved to deeper water on the north side, where she was still lying when she was arrested. On behalf of Mr. Hutchison it is deposed that at the time of the arrest his graving flat lay between the quay and the vessel, and was attached to the vessel by chain and rope painters, and was floated

(1) Brow. & Lush. 243, 9 Jur N.S 1110 (2) 10 C. B. (N.S.) 417.

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close to her to enable the workmen to execute the external repairs about the hull. Also, that there were on board of the vessel, chisels, chains, and other implements and materials belonging to Hutchison. These statements are disputed; but supposing them to be true, I think them quite inadequate to establish that the vessel was in the possession of Mr. Hutchison, so as to give him a possessory lien over her. His claim, therefore, as well as that of Mr. Rounce, must be postponed to the claims of the mortgagees.

Judgment for the mortgagees, with costs.

Proctors for the material men: *Lawrie & Keene.*
Proctors for the mortgagees: *Dyke & Stokes.*

May 7.

CARGO EX CAPELLA.

Collision—Claim for Salvage by Crew of Vessel found to blame.

1 P.D. 129

A collision occurred between two vessels. Both were found to blame. A cause of salvage was instituted by the master and crew of one of the vessels for having saved a quantity of specie laden on board the other vessel:—

Held, that the salvors were not entitled to reward for saving property which they had by their own wrongful acts contributed to place in jeopardy.

ON the night of the 31st of March, 1865, a collision occurred between the *Southern Empire* and the *Capella*. The *Southern Empire* was an English ship on a voyage from Callao to Liverpool. The *Capella* was a Dutch vessel, on a voyage from Amsterdam to Batavia with a cargo of silver specie. Shortly after the collision, the master and crew of the *Southern Empire* succeeded in saving the specie, and brought it to Liverpool, for which service they instituted a cause of salvage against the cargo.

The Court found that both vessels were to blame for the collision, and the question was, therefore, whether in these circumstances the salvors were entitled to reward.

Dr. Deane, Q.C., and *Butt*, for the plaintiffs, referred to *The Sappho.* (1) Though the plaintiffs were partly to blame for the collision, the defendants were also to blame.

(1) Sw. 242.

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Brett, Q.C., and *Lushington*, contrà. There can be no contribution between wrong-doers. By the 33rd section of the Merchant Shipping Amendment Act (25 & 26 Vict. c. 63), it was the duty of the plaintiffs' ship to assist the other. The plaintiffs cannot profit by their own wrong. The owners of the cargo were not to blame for the collision.

Dr. Deane, in reply. The Merchant Shipping Amendment Act does not apply. The duty to render assistance does not take away the right to salvage-reward.

Brett referred to *The Milan*. (1)

Cur. adv. vult.

May 7. DR. LUSHINGTON. The question for me to determine is whether when a collision has taken place between two vessels, and both vessels are held to blame, one of them can sue for salvage for having saved the cargo of the other from the perils consequent on the collision. I don't seek for authorities, but I look to the principle which ought to govern the case. In my mind, the principle is this, that no man can profit by his own wrong. This is a rule founded in justice and equity, and carried out in various ways by the tribunals of this country, and never, so far as I am aware, departed from by any English Court.

The application of this rule to the present case is obvious. The asserted salvors were the original wrong-doers: it was by their fault that the property was placed in jeopardy. The rule would bar any claim by them for services rendered to the other ship which was a co-delinquent in the collision; but the present claim, it is to be observed, is a demand for salvage against the cargo, the owners of which were perfectly innocent.

There has been no decision as to this particular question, at least to my knowledge, during my practice in this court, but I am not surprised at it, because I think that the claim is so opposed to common justice, it is very unlikely that any person would make the experiment. I pronounce against the claim with costs.

Solicitors for plaintiffs: *Marshall & Roberts.*

Proctors for defendants: *Pritchard & Sons.*

(1) Lush. 388.

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June 18.

THE MARIA.

Collision—Compulsory Pilotage "into and out of" the Port of Kingston-upon-Hull—2 & 3 Wm. iv. c. 105 (*Local*), *ss.* 22, 89.

The employment of a Humber pilot is not compulsory upon a vessel which is being towed from one dock to another in the port of Hull, as a vessel is not, in such circumstances, either passing "into or out of" the port, within the terms of the 22nd section of the Hull Pilot Act, or "bound to or from the port," within the terms of the 89th section of that act.

COLLISION. This was an action instituted by the owners of the schooner *Richard,* against the barque *Maria,* for a collision.

The collision took place off the Victoria jetty, at the entrance of the Hull river into the Humber. The *Maria* had finished her voyage; her cargo had been unlivered, and her crew discharged. At the time of the collision, she was being towed, in charge of a licensed Hull pilot, from the Victoria Dock, at Hull, through the Hull river and the old harbour, for the purpose of entering Humphrey's dry dock. At the hearing of the cause, the Court held that the collision had been occasioned by the default of the pilot.

On a subsequent day (28th of May), the question came on to be argued whether, in these circumstances, his employment was compulsory under the Hull Pilot Act. The following are the principal sections of that act, referred to in the arguments and judgment.

2 & 3 *Wm.* 4, *c.* 105: "*An Act for better regulating the pilotage of the Port of Kingston-upon-Hull, and of the River Humber, and for other purposes relating thereto.*" [4th July, 1832.]

S. 22. "And whereas the Guild or Brotherhood of Masters and Pilots, Seamen of the Trinity House in Kingston-upon-Hull, commonly called 'The Corporation of the Trinity House, in Kingston-upon-Hull,' have, as well by usage for a long period of years, as by virtue of letters-patent or charters granted to them by the Crown, been empowered to appoint pilots to conduct ships and vessels sailing or navigating *into and out of* the port of Kingston-upon-Hull, and the limits and liberties thereof, and into and out of and upon the river Humber, and from the said river out to

sea, and between Flamborough Head northward and Winterton Ness southward; and into and out of the several ports, creeks, harbours, and places situate between those two last mentioned headlands or places, in pursuance of which powers the said corporation have from time to time appointed a sufficient number of pilots for the purposes before mentioned: be it further enacted, that it shall be lawful for the said Guild or Brotherhood of Masters and Pilots, Seamen of the Trinity House in Kingston-upon-Hull, commonly called the Corporation of the Trinity House in Kingston-upon Hull, and they are hereby required, to grant licences under their common seal to such persons as they shall, after due examination, approve of and think properly qualified to be pilots for conducting ships and vessels *into and out of* the port of Kingston-upon-Hull, and of the port of Great Grimsby in the county of Lincoln, and upon any part of the river Humber, below the said port of Kingston-upon-Hull, and so far out at sea as to bring the North Ness of Dimlington on the coast of Holderness to bear or be seen a sufficient distance clear or open of the land to the southward thereof, so as to pass clear of a certain sand or shoal called the New Sand; and also so far along the coast to the northward thereof as the said North Ness of Dimlington, and to the southward thereof as a certain point or headland on the coast of Lincolnshire, commonly called or known by the name of Donna Nook; and the persons so licensed shall for the purposes of this act be called *Humber Pilots;* and all ships and vessels *sailing, navigating, and passing as aforesaid*, except as hereinafter provided, shall be conducted and piloted within the limits aforesaid by pilots so licensed, and by no other pilots or persons."

s. 89. "And in order to prevent doubts touching the meaning of certain expressions used in this act, be it enacted, that for the purposes of this act, the entrance of the river Humber shall be taken to be at an imaginary line drawn from the Spurn Point on the coast of Yorkshire to the floating light-vessel near the New Sand or the buoy of the said Sand, and from such floating light-vessel or buoy to a certain headland on the coast of Lincolnshire called Donna Nook; and the word pilots shall be taken to mean pilots licensed by the corporation of the Trinity House in Kingston-upon-Hull in pursuance of this act or the said recited

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act hereby repealed; and the words inward bound and outward bound shall in all cases (where a contrary or different meaning is not specifically expressed) be taken to mean respectively and to include all ships and vessels *bound to or from the said port* of Kingston-upon-Hull, or to or from some other port or place situate on the said river Humber, or some or one of the several rivers and streams flowing into the same, or to or from some or one of the several roadsteads in the said river Humber; and the port of Kingston-upon-Hull shall be taken to include the harbour and docks situate at the town of Kingston-upon-Hull, but not to extend higher up the river Humber than a certain clough, called Galley Clough," &c.

The arguments are fully reviewed in the judgment.

Brett, Q.C., and *E. C. Clarkson*, for the plaintiffs, referred to *The Killarney* (1); *The Annapolis.* (2)

Dr. Deane, Q.C., and *Lushington*, for the defendants.

Cur. adv. vult.

June 18. DR. LUSHINGTON [after stating the facts, and reading the sections of the Hull Pilot Act above set out.] It was argued on behalf of the owners of The *Richard* that the taking a pilot was not, under the circumstances, compulsory; that the words in the enacting part of the 22nd section, "into or out of" the port of Hull cannot mean within the limits of the port, and must refer only to inward or outward bound vessels; that is, to vessels coming from outside the limits, or going to a place outside the limits of the port; that the *Maria* was neither inward nor outward bound, but passing from one part of the port to another; and further, that this construction of the section is corroborated by the elaborate provisions made in the 40th and 41st sections for the distance to which outward bound ships and the places to which inward bound ships are to be piloted, and also by the careful definitions in the 89th section of the terms inward and outward bound vessels.

On the other hand, the owners of the *Maria* contend that the act contains no words expressly limiting its application to inward

(1) Lush. 427. (2) Lush. 295.

or outward bound vessels, and that the words of the 22nd section are large enough to apply to vessels navigating within the port of Hull. It was also suggested, that even on the supposition that the act was confined to inward or outward bound vessels, the *Maria* would come within the definition of those vessels contained in the 89th section, namely, "Vessels bound to or from the said port of Kingston-upon-Hull, or *to or from some other port or place situate on* the said river Humber, or *some or one of the several rivers or streams flowing into the same*, or to or from some or one of the several roadsteads in the said river Humber," because the *Maria* was going from one place on the Hull (which flows into the Humber) to another place on the Hull.

But as both the Victoria Dock, *from* which the *Maria* was going, and Humphrey's Dry Dock, *to* which she was going, and the whole of the intervening course, lie within the limits of the port of Kingston-upon-Hull, it is clear that if the 89th section bears upon the case of the *Maria* at all, it is by virtue of the words "to or from the said port of Kingston-upon-Hull."

The owners of the *Maria* further contended that the case falls within the scope of the act, because the same considerations apply as to vessels outward or inward bound; that the *Maria*, passing from the Victoria Dock to Humphrey's Dry Dock, would have to pass down, in part, at least, the same intricate channel as an outward or inward bound vessel, and would equally require pilotage in order to navigate with safety to herself, and not to do injury to other shipping in the river.

I do not consider that the Court can give much weight to these considerations of expediency. On this point, the case of *Rodrigues* v. *Melhuish* (1) appears to be an applicable authority. That was a case under the Mersey Pilot Act, which made pilotage compulsory, "in case the master of any ship outward bound should proceed to sea," &c. The facts were that the vessel being under contract with the Post Office to go to sea on the 4th of December, was on the 2nd taken under charge of a pilot out of Prince's Dock, at Liverpool, and towed by a steamer up the river, and there anchored; that, on the 3rd, whilst she was anchored, the pilot being on board, and also riggers to complete

(1) 10 Ex. 110.

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the rigging, but the master being on shore, the boat of the plaintiff was in some way swamped by the vessel, and by the vessel's fault. The Court of Exchequer were unanimous in holding that pilotage was not compulsory, because the vessel was not at the time proceeding to sea; and in delivering judgment the Chief Baron is reported to have said: "It might have been better, and the provisions of the act would have been more symmetrical (if I may be allowed the expression) if the duties of the pilot and of the owners in the case of a vessel going *out*wards, had been correlative with those of a vessel *in*ward bound. It is likely to be a more difficult undertaking to take a vessel out of dock, and into the river than taking her out to sea. But we do not sit to make the law, but to declare it as we find it." (1)

Moreover, it seems to me that the navigation of inward or outward bound vessels into or out of a port, and this navigation of vessels within the limits of a port, are not necessarily upon the same footing with regard to compulsory pilotage, for by the 362nd section of the Merchant Shipping Act, it is provided that "An unqualified pilot may within any pilotage district, without subjecting himself or his employer to any penalty, take charge of a ship as pilot. . . . . For the purpose of changing the moorings of any ship in port, or of taking her into or out of any dock, in cases where such an act can be done by an unqualified pilot, without infringing the regulations of the port or any orders which the harbour-master is legally empowered to give."

I am unable to hold that the *Maria*, being towed from one dock to another in the port of Hull, was either a vessel passing "into or out of" the port within the terms of the 22nd section, or a vessel "bound to or from" the port, within the terms of the 89th section.

I am therefore of opinion that, under the circumstances, pilotage was not compulsory upon the *Maria*, and that she is liable for the damages which she has occasioned to the *Richard*.

Proctors for plaintiffs: *Clarkson, Son, & Cooper.*
Proctor for defendants: *H. C. Coote.*

(1) 10 Ex. 116.

[IN THE ARCHES COURT.]

1867
May 4.

LINNELL AND WALKER *v.* GUNN.

Church rate—53 *Geo.* 3, *c.* 127—*Order made by Magistrates withdrawn*—*Res Judicata*—*Ecclesiastical Court*—*Jurisdiction.*

A parishioner having been summoned before the magistrates of his parish, under 53 Geo. 3, c. 127, for non-payment of a church rate under 10*l.*, informed them that he disputed the validity of the rate; the magistrates, nevertheless, made a verbal order upon him for payment; but on a subsequent day withdrew the order, and informed him of such withdrawal by letter.

The churchwardens then instituted proceedings to enforce the rate; the defendant appeared under protest:—

Held, that the matter was not res judicata, and that the Ecclesiastical Court had jurisdiction to enforce the rate.

THIS was a cause of subtraction of church rate, promoted by William Linnell and Joseph Walker, the churchwardens of Woodford, Northamptonshire, against Joseph Gunn, a parishioner and inhabitant of that parish. It was brought in the Court of Arches by letters of request from the Consistorial Court of Peterborough. On the 4th of March last the defendant appeared under protest to the jurisdiction. His petition in extension of the protest stated: That the pretended rate for which proceedings have been commenced in this cause was howsoever made on the 17th of May, 1866, and the amount at which Joseph Gunn is assessed thereat is 6*s.* 8*d.*; that on the 9th of July, 1866 (the validity of the rate not having been disputed in any ecclesiastical court), a summons was issued by a justice of the peace for the county of Northampton, calling upon Joseph Gunn to appear on the 16th of July, 1866, at the police station at Thrapstone, and shew cause why he should not pay the rate; that the said summons was subsequently served upon Joseph Gunn, and on the 16th of July he attended with his solicitor before two justices, as therein directed; that the two justices then and there sitting examined upon the oath of several persons into the merits of the complaint, and ordered Joseph Gunn to pay the said sum of 6*s.* 8*d.* The petition concluded with a prayer that the Court would pronounce for the protest, and dismiss defendant with costs.

The answer filed by the churchwardens was to the effect: That

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although it is true that the church rate for which proceedings have been commenced in this cause was made on the 17th of May, 1866, and that in obedience to a summons issued for that purpose Joseph Gunn, the defendant, attended with his solicitor on the 16th of July before two justices at Thrapstone, and that they then and there ordered him to pay the sum of 6*s.* 8*d.*, the amount of his assessment to the said church rate, together with the costs; yet they allege that Joseph Gunn, by John Bennett, his attorney, then and there, and before the making of the said order, gave notice to the said justices that he disputed the validity of the rate, and contended, first, that the rate was invalid, because the time for taking the poll at a vestry meeting, held on the 27th of April, 1865, of the inhabitants and occupiers assessed to the relief of the poor of the parish of Woodford, in favour of a resolution assenting to the borrowing of a sum of money of the Commissioners for Public Works for the repairs of the roof and tower of the parish church of Woodford, to be secured on and to be repaid by instalments, with interest, out of rates to be for that purpose from time to time made in the parish (and by which poll the resolution was carried, and for the repayment of an instalment of which loan with interest the rate in question was made)—was insufficient, and that the polling ought to have been adjourned to another day; and secondly, because the rate as set out on the face of it was bad, inasmuch as in very many cases several persons were charged under one heading, instead of the names of all such persons being recited, and then the assessment divided. And John Bennett accordingly, on behalf of Joseph Gunn, contended that the jurisdiction of the justices was ousted, and that the proceedings for the recovery of the rate could only be taken in an ecclesiastical court.

That, notwithstanding the objection so taken to the jurisdiction, the justices in error made an order upon Joseph Gunn to pay the said sum of 6*s.* 8*d.* and costs, but that such order was not drawn out or in any manner acted upon; that on the 30th of July, 1866, four justices of the peace for the said county, sitting in petty sessions at Thrapstone, did, on the application of the attorney for the promoters, on the ground that such order was invalid and could not be enforced in law, direct such order to be withdrawn, and that such direction was duly entered in the minute book of said sessions.

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That the said John Bennett was by a letter from the clerk of the said justices at Thrapstone, dated the 1st of August, 1866, informed that the justices had withdrawn the aforesaid order, so that it has never been in any way acted upon, and has been treated by the churchwardens as null and void, and of no effect in law whatever. The answer then prayed the Court to order the defendant to appear absolutely.

The reply stated that the order of the justices made on the 16th of July, 1866, could not be legally withdrawn, as alleged, on the 30th of that month, and that the defendant had no notice of any application intended to be made by or on behalf of the churchwardens on the 30th of July, to the justices sitting in petty sessions at Thrapstone.

Dr. Swabey, in support of the protest, contended that on the facts stated in the petition and answer, and which were admitted, the Court had not jurisdiction; that the promoters having obtained a judgment in another court, which could only be quashed by certiorari in the Court of Queen's Bench, the matter was res judicata: *Reg.* v. *Pedler.* (1)

Dr. Tristram, for the churchwardens, contended that the order made by the magistrates after the notice of the defendant that he disputed the validity of the rate, was a mere nullity, and as it was never given as required by the statute, under the hands and seals of the magistrates, it could be withdrawn; that there had therefore been no proceedings sufficient to oust the jurisdiction of the Ecclesiastical Court. He referred to *Ricketts* v. *Bodenham* (2); *Reg.* v. *The Inhabitants of St. Clement's.* (3)

DR. LUSHINGTON. This case comes before the Court on the pleadings alone, and without evidence in support of them. I must therefore assume the facts alleged on both sides to be true, and consider the result. One thing is clear, the magistrates made a blunder; and the only question is, what is the effect of that blunder? Can it be said that it took away the jurisdiction of this Court? I conceive that if, under the circumstances, the magistrates could not give judgment, what they did was null, and that

(1) 12 L. T. (N.S.) 17. (2) 4 Ad. & E. 433. (3) 12 Ad. & E. 177.

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I am bound to proceed. It cannot be denied that the churchwardens were justified in going before the magistrates; the amount claimed being under 10*l.*, the act of parliament required that they should do so. A rate had been laid, and a demand made from the person summoned, who had refused to pay, and they asked for an order to compel payment. But it was impossible for the magistrates to make such an order, for the person cited said, "You have no jurisdiction," and he set forth several reasons. It is not for me to decide whether those reasons are right or wrong. It has been determined by the Court of Queen's Bench that, if the person summoned states objections sufficient primâ facie to satisfy the magistrates that he has a bonâ fide intention to dispute the rate, they will hold their hands. According to the expression in the act of parliament, they "shall forbear giving judgment thereupon." (1) In this case, the defendant having disputed the validity of the rate, it was the duty of the magistrates to forbear; instead of which they gave a verbal order that the defendant should pay the rate. It appears, however, that they afterwards bethought them that they had no authority to make such an order, and it was accordingly recalled.

The real question is, whether this order so made and recalled can oust the jurisdiction of this Court? It has not been argued that it was open to the churchwardens, having obtained the order, to ask some other Court to declare it invalid. The churchwardens themselves of their own motion could not enforce it, and the magistrates would not enforce an order which they had recalled. If the churchwardens had gone to the Court of Queen's Bench, they could have had no redress there.

My jurisdiction will not be ousted unless I am satisfied from the circumstances of the case that the magistrates had jurisdiction. I must take it that, although the sum claimed was under 10*l.*, the magistrates held their hands, because the validity of the rate was disputed.

I pronounce against the protest, with costs.

Proctor for plaintiffs: *G. C. Ring.*

Proctor for defendant: *E. W. Crosse.*

(1) 53 Geo. 3, c. 127, s. 7.

THE WASP.

1867
June 18.

Pleading—Assignment of Causes of Action—Trustee.

In a suit for building and equipping a vessel, the defendant pleaded that the plaintiffs' claim had vested in their trustee under a composition deed; and the plaintiffs in their reply alleged that they had assigned the causes of action before the execution of the deed, and that the suit was now brought in their names as trustees for the assignees. On motion in objection to the reply:—

Held, that the assignment of the causes of action carried with it all rights of action, which though inchoate at the time might subsequently become complete.

And that where there is an absolute assignment of a beneficial interest in a debt, the assignor may sue as trustee for the assignee, notwithstanding his subsequent execution of a composition deed.

THIS case came before the Court on a motion by the defendant to strike out the first and eighth articles of the reply.

The plaintiffs were shipbuilders. In 1864 and 1865 they built and equipped the *Wasp*, and the vessel being now under arrest for another matter, they brought this action under the 4th section of the Admiralty Court Act, 1861. That section is as follows:—

24 Vict. c. 10, s. 4. "The High Court of Admiralty shall have jurisdiction over any claim for the building, equipping, or repairing of any ship, if at the time of the institution of the cause the ship or the proceeds thereof are under arrest of the Court."

One of the defences set up by the answer was, that after the accruing of the causes of action the plaintiffs made a composition deed with their creditors, and duly registered it under the Bankruptcy Act, 1861, whereby the alleged causes of action and other property of the plaintiffs became vested in William Alexander as trustee for their creditors.

The first and eighth articles of the reply were as follow:—

"1. As to the first article of the said answer. Before the execution and registration of the said deed, the plaintiffs assigned the causes of action in the petition mentioned for certain valuable consideration to the North and South Wales Bank of Liverpool, of which assignment the defendant had notice before such execution and registration of the said deed; and the property comprised in the said deed did not include the said causes of action, and the

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said causes of action are not vested and never were vested in the said William Alexander."

"8. This cause was instituted and is prosecuted in the names and with the consent of the plaintiffs for the benefit of the said North and South Wales Bank, to which bank the causes of action in the petition contained were assigned, as in the first article of this reply mentioned, the defendant having notice of such assignment as in the last-mentioned article stated."

May 28. *Butt*, in support of the motion. The plaintiffs could not assign their rights against the ship, for there was no lien upon her. They had no rights against the ship until she was arrested, and this cause was instituted: *The Pacific.* (1) Therefore the right of action against the ship could not vest by the assignment to the bank. It is not enough to state that the causes of action were assigned. They do not plead any deed. This was a mere assignment, such as a banker takes as security for his advances.

Cohen, contrà. The replication is old, and is in the usual form in general use at common law: Bullen and Leake's Precedents, p. 445; *Monk* v. *Sharp* (2); *Dangerfield* v. *Thomas.* (3)

Butt replied.

Cur. adv. vult.

June 18. DR. LUSHINGTON. I do not understand that the defendant presses the objection that the plaintiffs cannot sue in this court as bare trustees for the bank to whom the causes of action have been assigned. Such objection is, in truth, untenable. The objection relied on is, that at the time of the assignment to the bank the plaintiffs had no claim against *the vessel* to assign, as they had not commenced proceedings against her (from which date such claim would commence), and could not commence proceedings by reason of the vessel not being under arrest; that the claim against the vessel did not accrue until after the plaintiffs had executed the deed in favour of their creditors, and consequently that the claim passed to the trustees for the creditors.

It seems to me, however, that the assignment by the plaintiffs to the bank of the causes of action would carry with it all right of

(1) Brow. & Lush. 243. (2) 2 H. & N. 540. (3) 9 Ad. & E. 292.

action to recover the debt, including any right for that purpose to proceed against the vessel which might then be, as it were, inchoate, but which might subsequently become complete. If so, and if the assignment to the bank was substantially an absolute assignment of the entire debt, divesting the plaintiffs of all beneficial interest in the debt, then it is clear, from the cases cited, especially *Monk* v. *Sharp* (1) and *Dangerfield* v. *Thomas* (2), that the plaintiffs might sue as trustees for the bank, notwithstanding that they subsequently executed the composition deed in favour of their creditors.

Whether the assignment was absolute, and of the entire interest of the plaintiffs, I have no particulars before me to enable me to judge, the reply simply alleging, in general terms, that the causes of action were assigned. But from the Book of Common Law Precedents (Bullen and Leake, p. 445), to which I was referred, it seems that an allegation in general terms is the form usually adopted in the common law procedure. I shall therefore refuse to strike out the first or eighth article of the reply, but it will be open to the defendant to counter-plead that the assignment was not such as to divest the plaintiffs of all beneficial interest.

Attorneys for plaintiffs: *Field & Roscoe.*
Attorneys for defendant: *Gregory & Rowcliffes.*

(1) 2 H. & N. 540. (2) 9 Ad. & E. 292.

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June 18.

THE ARGENTINA.

Bill of Lading—Agent—Assignee for Value—Costs.

An assignee of a bill of lading is entitled to the goods therein named, if he is a bonâ fide assignee for value, without notice of fraud or insolvency on the part of the person to whom the goods were consigned.

G. jun., a merchant of New York, shipped for Bristol, in the *Argentina*, three parcels of oil-cake—two parcels for G. sen., his correspondent there, and the third for Stone. The bills of lading for all three parcels in triplicate he sent to G. sen., strictly enjoining him not to part with the bill of lading of Stone's parcel to him "without first receiving payment." G. jun. drew a bill of exchange for the whole value of the parcels on G. sen., which was discounted. Stone subsequently induced G. sen. to deliver to him his bill of lading, on giving a bill of exchange on one Stiles, and a promise of immediate payment of the cash. Stone, having endorsed the bill of lading to Russell for value, became bankrupt, as also did Stiles. On the arrival of the vessel, Russell had notice served on the master not to deliver the goods but to his order. G. sen. presented one of the copies of the bill of lading, which he had retained, and demanded the delivery of the third parcel shipped for Stone, as well as the other two to which his title was undisputed. The master refused to deliver the third parcel, and retained thirty-two barrels out of the other parcels for the alleged non-payment of freight, and also refused to deliver the third parcel to Russell. Two suits were brought against the vessel—one by G. sen. for the non-delivery of the third parcel and the thirty-two barrels retained for freight; and the other by Russell, for the non-delivery of the third parcel to his order.

The two suits having been heard together, the Court dismissed the claim of G. sen. with costs, and

Held, 1. That Russell was a bonâ fide assignee for value, without notice of fraud.

2. That G. sen. had authority to deliver the bill to Stone, as the words in the instructions from G. jun. were ambiguous.

3. That Russell was entitled to the goods, and to the costs of his suit against the owners of the vessel.

In this case two actions were brought, each under the 6th section of the Admiralty Court Act, 1861 (24 Vict. c. 10), by William Russell and John Gilbert sen., the assignees of bills of lading, against the Austrian vessel, the *Argentina*, for breach of contract or duty by the master in not delivering the goods comprised in the bills of lading. The two actions related mainly but not altogether to the same goods. The circumstances of the case are fully detailed in the judgment. The cause was argued on the 1st of June by

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The Solicitor General (*Sir J. B. Karslake*), and *Pritchard*, for the plaintiff, William Russell.

Dr. Deane, Q.C., and *Dr. Tristram*, for the plaintiff, Gilbert sen.

Brett, Q.C., and *Clarkson*, for the defendants.

Cur. adv. vult.

On the 18th of June, DR. LUSHINGTON delivered judgment:—

On the 16th of January, 1866, John Gilbert jun., merchant of New York, shipped on board the *Argentina*, then lying at New York and bound for Bristol, three parcels of oil-cake, consisting respectively of 600, 410, and 270 barrels, the invoice price of the whole being 1039*l.* 1*s.*, and the price of the last-named parcel, the 270 barrels, 231*l.* 17*s.* 4*d.* For each of the three parcels the master signed separate bills of lading, and in each case in triplicate; the tenor of each bill of lading was to make the goods deliverable unto order or assigns on payment of freight. John Gilbert jun. drew upon his father, John Gilbert sen., his correspondent at Bristol, for the total invoice price of the three parcels: namely, 1039*l.* 1*s.* in two bills of exchange, and took the bills of exchange to Messrs. Dennistoun & Co., to get them discounted. Messrs. Dennistoun & Co. accordingly discounted them, upon receiving, as a security for the acceptance of John Gilbert sen., the bills of lading for the two larger parcels, namely, those consisting respectively of 600 and 410 barrels, duly endorsed in blank by John Gilbert jun. Then, in accordance with their usual practice, they forwarded the two bills of lading and the two bills of exchange to their firm in this country, who obtained from John Gilbert sen. his acceptance of the bills of exchange, and transferred to him the bills of lading. It is not disputed that John Gilbert sen. thereby became entitled to receive the cake comprised in the bills of lading for the two parcels upon payment of the freight. He has duly met the acceptances of the bills of exchange.

The third parcel of oil-cake, containing 270 barrels, John Gilbert jun. disposed of differently. He intended them for a Mr. Stone, a merchant at Bristol, but for greater security he effected the sale through his father, in the following manner. He sent to his father on the 23rd of January, 1866,

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1. The bills of lading in triplicate for the 270 barrels endorsed by himself, John Gilbert jun. in blank.

2. An invoice for the same goods, shewing the price to be 231*l.* 17*s.* 4*d.*

3. A bill of exchange for the invoice price 231*l.* 17*s.* 4*d.*, drawn by himself, John Gilbert jun., in his own favour, upon Frederic Stone.

4. A copy of a letter of the same date, the 23rd of January, which he was sending to Stone by the same mail, informing Stone that the shipment had been made, and that the drafts and bills of lading were to be sent by the same post.

These four documents, sent by John Gilbert jun. to his father, were enclosed in a letter, of which the following is an extract:—

"I had a letter from Messrs. Stone, per *City of New York* ordering 5000 or 6000 barrels of oil-cake. I have thought it well to invoice the 270 barrels to him at present market price, and draw against same at fifty days. I enclose you herein bills of lading and draft on him for amount of same: say 231*l.* 17*s.* 4*d.* I have drawn them to myself, and endorsed the bill with merely my name. So that you can fill up as may be in consonance to your wishes. You will observe the 270 barrels are not insured. Please see this is done. . . . Though I send Stone's bill, it is understood, of course, you do not part with bills of lading *without first receiving payment.*"

It appears that Stone was formerly clerk to John Gilbert sen., and had set up business for himself, and occasionally had dealings with his former master, and received consignments from John Gilbert jun. from America. But neither of the Gilberts put much faith in him. On the 24th of October, 1865, John Gilbert jun. had written to his father:—

"With regard to Stone, you ought to know him best, and though I should not like to prejudge any one, I must say I don't think he is very reliable. I shall always therefore take the precaution of sending you bills of lading and drafts, and as we have had experience, and pretty freely exchanged our opinions respecting him, I pray you be careful with the documents; and not suffer yourself to be fool'd to part with them without the *cash*; let none

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of his professions or promises influence you: this is my strict wishes and *orders*."

Again, later, in December, 1865, in making a consignment for Stone by the *Glacier*, John Gilbert jun. wrote to his father:—

"The bill lading per *Glacier* I shall endorse blank for Stone, and whatever shipments I might make him shall as heretofore remit to you the bills lading, which you will not let him have *without payment first being made* you. I can't make him out."

And it would seem that on January 31, 1866, Stone having sold this consignment by the *Glacier*, to the plaintiff Russell, applied on behalf of the purchaser to Gilbert sen. for the bill of lading, assuring him that he need not be afraid of the balance, as he (Stone) would give him the same the moment the bill of lading was forthcoming.

To return to the transaction, the subject of the present proceedings. These letters of the 23rd of January from John Gilbert jun. to his father, and to Stone, reached Bristol about the 7th or 8th of February, and shortly afterwards Stone applied to John Gilbert sen. for the bill of lading of the 270 barrels. What passed at the interview is disputed; but the result was, that Gilbert sen. did not at that time transfer the bill of lading to Stone, nor did Stone accept the bill of exchange drawn upon him by John Gilbert jun.

Subsequently, on the 16th of February, John Gilbert sen. handed to Stone the bill of lading, on receiving from Stone a cheque for 100*l.*, and a bill of exchange for 280*l.*, to fall due on April 19th, drawn by Stone and accepted by one Stiles. This is admitted, but particulars are disputed. Stone declares that the cheque for 100*l.* on general account between himself and John Gilbert sen. (for Stone was in his debt) and the bill for 280*l.* were the consideration for the unconditional delivery of the bill of lading; whilst Gilbert sen. swears that the cheque for 100*l.* was on an account altogether different from that of the 270 barrels, and that Stone promised to bring him on the same day, the 16th of February, cash for the invoice price of the barrels, and that the bill of exchange for 280*l.* was offered and taken, only as a security for the cash; and that it was understood that the bill of lading was not to be used till the cash had been brought; and, therefore,

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that he, Gilbert sen. simply delivered the bill of lading without making any endorsement upon it that delivery should be made to Stone or order.

On the same day, the 16th of February, Stone met Russell, who is the plaintiff in one of these causes, and sold him the 270 barrels, simply for the invoice price plus the insurance. This amount was really 240*l.* 18*s.* 6*d.*, but at this time Stone only knew it was something a little short of 250*l.*, as he had not the invoice with him, and therefore it was agreed that Russell should accept a bill drawn by Stone for 250*l.* to fall due on April 19th (the same day as that on which the bill for 280*l.* fell due), and that Stone should subsequently return to Russell the difference. This was done; and Stone thereupon gave Russell possession of the bill of lading, having first endorsed it with "Deliver to the order of Mr. W. Russell, Frederic Stone." On this bill Stone raised money and the bill has been duly met by Russell. Stone never paid to Russell the difference, 9*l.* 1*s.* 6*d.*

Three days afterwards, on February 19th, John Gilbert sen. paid into his banking account the bill of exchange for 280*l.* drawn by Stone and accepted by Stiles, to be discounted, but the bank declined to discount it, and within a very few days, first Stiles and then Stone became bankrupt.

Thereupon John Gilbert sen. having in his possession two duplicates of the bill of lading for the 270 barrels, delivered one of them to Messrs. Turner, Nott, & Strong, with instructions to present it to the master of the *Argentina* as soon as ever the vessel arrived in port, and endorsed it "Deliver to the order of John Gilbert, Bristol." He also entrusted to the same firm the bills of lading for the other two parcels (of the 600 and 410 barrels respectively), concerning the ownership of which there was no dispute.

The vessel arrived at Bristol on the 24th of March; whilst she was still at the mouth of the Avon, Russell caused the master to be served with notice that he was endorsee and holder of the bill of lading for the 270 barrels, and warned him not to deliver, except to him (Russell), or to his order. But the first actually to present the bill of lading was Gilbert sen. through Read, who received the bill from Messrs. Turner & Co., and who acted as broker for the

ship. The master refused to deliver to Read the 270 barrels, but marked the bill of lading with his initials. Shortly afterwards Russell presented his bill of lading, and was referred by the master to Read. Messrs. Turner & Co., finding a dispute was inevitable, handed back to Gilbert sen. his bill of lading, and Gilbert sen. entered the goods at the custom-house at Bristol, and paid the dues.

I do not think it necessary to consider the evidence as to whether freight was actually tendered by either party for these 270 barrels. It is clear that the master waived tender and refused to deliver because of the dispute as to the ownership. Nor is it necessary to examine how it came about that part of the 270 barrels was delivered some to each claimant. As a fact, in some way or other nine barrels were delivered to Russell, and in some way or other forty barrels were delivered to Gilbert sen. and by him placed in the warehouses of Messrs. Turner & Co., but apparently without their consent. The circumstances relative to this part delivery are disputed, but I am satisfied that the master never recognised the title of either party. He has never received any freight from either party, in respect of any of the 270 barrels. The 270 barrels have been thus disposed of:—

9 are in the possession of Russell.
40 are in the warehouses of Messrs. Turner & Co., and are held by them subject to the order of the Court.
221 are in Read's possession subject to the order of the Court.

The other two parcels, containing respectively the 600 and 410 barrels have all been delivered to Gilbert sen., with the exception of thirty-two barrels which are detained by the master on the alleged ground of non-payment of freight.

On the 4th of April, Gilbert sen. arrested the vessel and commenced this action under the 6th section of the Admiralty Court Act, 1861, for breach of contract and duty on the part of the master in not delivering to him the 270 barrels, and also the thirty-two barrels, the remainder of the 1010. Russell instituted a similar action in respect of the 270 barrels. The master thereupon filed a bill in chancery to compel Gilbert sen. and Russell to interplead, but the Vice-Chancellor dismissed the bill with costs,

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on the ground that the case was not one for interpleader; and accordingly the two actions have proceeded in this court, and have been carried on separately. Early in May, Gilbert sen. became bankrupt, and his suit is conducted by his creditors' assignee, Mr. Barrett, of the house of Dennistoun & Co.

With regard to the thirty-two barrels, which were part of the 1010, and which have not been delivered, the only question is, whether the entire freight has been tendered. That some freight is still due is not denied; but Gilbert sen. alleges, that when he paid to Read a sum on account, he, Gilbert sen., promised to pay the balance as soon as Read would give him the freight note, and that Read, though repeatedly asked, has never done so. Gilbert sen. also alleges, and in this he is to a certain extent corroborated by his clerk, that he tendered further cash to the master and mate. This is denied by Read, who is the broker of the vessel. There is thus a conflict of evidence. Upon the whole, considering that the master never disputed the title of Gilbert sen. subject to payment of freight, and that there was no dispute as to the amount of freight due, and that some freight is still due, I consider that the probabilities are in favour of the master's contention, that freight was not tendered. I think, therefore, that the claim of Gilbert sen in respect of these thirty-two barrels falls to the ground.

I now proceed to discuss the title to the 270 barrels. The law is, in my opinion, settled by the cases of *Gurney* v. *Behrend* (1) and the *Marie Joseph*. (2) Russell, as assignee of the bill of lading, would be entitled to the goods, if,

1. He were bonâ fide assignee for value, without notice of fraud or insolvency on Stone's part; and

2. If Gilbert sen. had authority to transfer the bill of lading to Stone.

If these conditions were observed, it would be immaterial whether the bill of lading was obtained by Stone on false representations or promises (that he would bring cash) which were never fulfilled.

The first question, therefore, for the Court is, whether Russell is a bonâ fide assignee for value without notice. As to this, I have no doubt; Russell certainly is an assignee for value, for he paid 250*l.* for the goods. Gilbert sen. declares that Russell must have

(1) 3 E. & B. 622. (2) Law Rep. 1 P. C. 219.

known of Stone's insolvency, for that Russell and Stone were partners, but the existence of any partnership is denied by both of them, and I see no evidence of the fact. The purchase by Russell from Stone of a previous consignment from Gilbert jun. proves nothing at all. Then the circumstance, that the transfer of the 270 barrels was made at the invoice price without profit to Stone, and that Russell, without waiting to ascertain what was the exact price, gave to Stone a bill of exchange for 250*l.*, are unusual indeed, but quite insufficient to establish a charge of collusion, or to shew that Russell was aware of Stone's impending insolvency. Both Russell and Stone depose that their meeting which led to the bargain was an accidental meeting on 'Change. I shall therefore hold that Russell is a bonâ fide assignee for value without notice.

The second question is, whether Gilbert sen. had authority to part with the bills of lading to Stone. It is asserted that Gilbert sen. was not a partner with his son, in which case, of course, he would have had authority to deal with the bill of lading, but only as agent, and that as such agent he had received strict injunctions not to part with the bill of lading without payment.

Now, in the first place, "without payment" is an ambiguous term. Payment may be in cash, or may be in bills: and I quite concur in the opinion expressed in *Gurney* v. *Behrend* (1), that "if the language is equivocal, the construction to be put upon it ought to be rather against the party who places an endorsed bill of lading in the hands of third persons, and enables them to deal with others as if they had complete control over it."

In the second place, it seems very doubtful that Gilbert jun. had any power to impose such restrictions upon his father. Not only, according to his own account, had his father an equal interest in the consignment—a position which it is difficult to distinguish from that of partner—but the son in New York had already received payment for these goods, and that by means of discounting bills drawn by himself on his father; so, in fact, the son had no further interest in this transaction, except a contingent liability upon the bills in the event, which did not take place, of the father's acceptance being dishonoured; and on the other hand, the father was immediately liable for the whole of the invoice price of

(1) 3 E. & B. 622.

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the goods. Under these circumstances, it seems impossible to question that Gilbert sen. had power to deliver the bill of lading to Stone. In my opinion, therefore, Russell has established his claim to the 270 barrels upon payment of freight, and that Gilbert sen. has failed.

With regard to costs, Gilbert sen. having failed in his suit must pay the costs of it.

With regard to the costs of Russell's suit against the ship, the Court has had some difficulty in coming to a satisfactory conclusion. Russell has succeeded in his suit against the ship, and having succeeded, would, according to the ordinary rule, be entitled to his costs. But the difficulty in which the master was placed between the two conflicting claims, renders the Court reluctant to enforce the rule against the owners of the vessel. Admitting this however, and giving full consideration to the fact that the master endeavoured, by application to the Court of Chancery, to compel the plaintiffs in the two suits to interplead, I think no sufficient cause is made out to exempt the vessel from bearing the costs of a suit which has been unsuccessfully defended on its behalf. I shall therefore pronounce Russell entitled to receive his costs.

The Court has reason to lament that it did not receive information of these concurrent suits at the time when they were first instituted: for I feel assured that it was competent to the Court, in the exercise of its jurisdiction, to have relieved the vessel from the cost of resisting, at the same time, two conflicting demands.

Solicitors for the plaintiff Russell: *Pritchard & Englefield.*
Proctors for the plaintiff Gilbert: *Fielder & Sumner.*
Proctors for defendants: *Toller & Sons.*

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June 20.

Bottomry Bond—Master's Claim—Priority—Marshalling Assets.

The general rule that a master who has bound himself as well as ship and freight for the payment of a bottomry bond is not entitled to payment of his own claims in priority, will not be acted upon where the bottomry bondholder will not be prejudiced by the master being paid before him.

Where a master gave bonds on ship, freight, and cargo, binding himself, and the bonds would exhaust ship and freight, thus defeating the master's claim:—

Held, that the master's claim should have priority over the claims of the bondholders, thus marshalling the assets between them.

THIS was a motion on behalf of the master of the *Edward Oliver*, for payment of his wages and disbursements out of the proceeds of the ship and freight, under the following circumstances:—

Four causes had been instituted against the *Edward Oliver:* one by the master John Lucas Follett, for wages and disbursements; two by bottomry bondholders, the bonds in each case being upon ship, freight, and cargo, and stating the master to be personally liable; and the fourth for towage. The owners of the ship had not appeared: the owners of the cargo had appeared and given bail for the payment of the bottomry bonds. Freight had been paid into court and the vessel had been sold. The Court, reserving all question of priorities, had pronounced in favour of the master's claim; and with respect to the bonds had pronounced in favour of their validity, and had condemned the proceeds of the vessel and freight in the amount and in costs, and had condemned the owners of the cargo and their bail in the balance, if any, due on the bonds, after the proceeds of ship and freight had been exhausted, and in costs. The amounts of the claims were as follow:—

Cause 3689, master's claim . . .	£1281 9 4
Cause 3709, bottomry	1162 6 2
Cause 3744, bottomry	3486 18 6
Cause 3972, towage	

exclusive of costs in each cause.

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To meet these charges there were the following funds:—

Vessel, gross proceeds	£2310	0	0
Freight paid into court . . .	350	0	0
	2660	0	5
Deduct marshal's fees	207	13	4
Balance in registry	£2452	6	8

June 4. *Lushington*, in support of the motion. The question is this, whether the master's claim for wages and disbursements is to be postponed because he signed the bond.

No doubt it was laid down in *The Jonathan Goodhue* (1) that the bondholder has priority where the master binds himself; but in *The Salacia* (2), where the master had not personally bound himself, but had covenanted that the barque, cargo, and freight should be at all times liable after the voyage for the payment of the money, the priority of the master's claim to the bondholder was confirmed, and the tendency of that case goes far to limit *The Jonathan Goodhue*. The claim for disbursements is on the same footing. In *The Mary Anne* (3) priority was given to the master's claim for wages and disbursements over a mortgagee. In *The Union* (4) there was a bottomry bond and a claim for seamen's wages. The owners of the cargo intervened to resist the mariners' claim, but the Court ultimately pronounced for its priority over that of the bondholder. In *The Priscilla* (5), which may be quoted to shew that the last bondholder is entitled to absolute priority, that point, as appears by the reporter's note, p. 5, was not decided; consequently, if the bondholder is secure, he is not necessarily to be first paid. It is not equitable for the owners of the cargo to say that, because the master signed the bond in their interest and in order to bring the cargo to England, he is not to have his wages. The owners of the cargo are not the assignees of the holders of the bonds. They try to insist on a legal right

(1) Swa. 524.
(2) Lush. 545.
(3) Ante, p. 8.
(4) Lush. 128.
(5) Lush. 1.

which belongs to the bondholders alone. The question now raised for the first time is, whether the owners of cargo can step in between the bondholders and the master to deprive the master of his right to wages and disbursements, the bondholders not opposing the master's claim.

Gainsford Bruce (*R. G. Williams* with him), for the owners of the cargo. This is an attempt to make cargo pay master's wages. The rule is clear, that where a master renders himself liable on a bond, he does an act which renders it inequitable that his claim should be preferred. The hardship in this case is not greater than in *The Jonathan Goodhue* (1); *The Union* and *The Salacia* do not apply. In neither of those cases did the master bind himself personally.

Clarkson (*Butt* with him), for the bondholders. This is an attempt to induce the Court to marshal the assets to the prejudice of a third party: *Aldrich* v. *Cooper*. (2) Marshalling will not be enforced against the rights of a third party.

Lushington replied.

Cur. adv. vult.

June 20. DR. LUSHINGTON [after stating the facts as above]. It appears that the amount of proceeds of ship and freight is insufficient not only to pay both the master's claim and the bonds, but even the bonds alone. The bondholders, however, are secure, because they have the bail of the owners of cargo to fall back upon, but the master's lien for wages and disbursements extends only to ship and freight. The motion to the Court is to pronounce the master entitled to priority of payment out of the proceeds of ship and freight now in the registry. If this motion is refused the ship and freight will be exhausted in payment of the bonds (and indeed will have to be supplemented by the cargo), and the master, who has no claim against the cargo, will lose his remedy in rem altogether. If, on the other hand, it is granted, the result will be that the master will first be paid out of ship and freight; then the remainder of the proceeds of ship and freight will be exhausted in part payment of the bonds, and the balance will be paid by the

(1) Swa. 524. (2) 2 White & Tudor, L. C. 71.

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owners of cargo. This balance, as compared with the balance in the other alternative, will of course be greater by the exact sum paid out of the proceeds of ship and freight to the master. In either case the bonds would be paid in full. The contention is solely between the master and owners of cargo.

The owners of the cargo contend that the rule of the Court—established in the case of *The Jonathan Goodhue* (1)—that the holder of a bottomry bond, upon which the master has made himself personally liable, is paid out of the proceeds of ship and freight before the master, is an *absolute* rule. In support of this contention, reference was made to the case of *The Priscilla.* (2)

In that case there were two bonds, one upon ship and freight only, and the other, of posterior date, on ship, freight, and *cargo;* and the rule that a posterior bond takes precedence over an earlier bond was enforced, although the enforcement of the rule was not necessary for the protection of the posterior bond, and resulted in the earlier bond being left unpaid. For the effect of precedence being given to the posterior bond, coupled with the rule that ship and freight must be exhausted before cargo is resorted to in payment of bottomry bonds, was that the whole of the proceeds of ship and freight were exhausted in payment of the posterior bond, and nothing was left to satisfy the earlier bond. Whereas, if the earlier bond had been paid out of proceeds of ship and freight, the remainder, supplemented by the cargo, would have been enough to discharge the second bond in full. The point, however, as to whether the rule gave an *absolute* priority does not seem to have been raised in argument.

Mr. Clarkson further directed the attention of the Court to a well-known rule of equity, that no marshalling is permitted to the prejudice of third parties. In the present instance it was alleged that marshalling of assets between the master who has ship and freight as his only securities, and the bondholders who have ship, freight, and cargo, would work to the injury of the owners of cargo, who would thus become charged with a larger sum than they would otherwise be liable to; and further, that this additional

(1) Swa. 524. (2) Lush. 1.

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charge would be improperly saddled upon the cargo, because, though nominally due under a bond affecting cargo, it would really represent a burden to which cargo is not liable, viz. wages and disbursements of master.

On the other hand, it is argued for the master, that the master's lien on ship and freight for wages and disbursements in general takes precedence of a bottomry bond, and though this lien is liable to be postponed to a bottomry bond, for which the master has made himself personally liable, there is no absolute rule to this effect; that it is a rule made only for the protection of the bondholder, and consequently does not obtain where the bottomry bondholder does not need such protection. That in this instance the bottomry bonds will certainly be paid in full out of cargo, if not out of ship and freight; that the holders, therefore, have no interest in claiming to be paid out of ship and freight before the master, and that the owners of cargo have no equity to insist upon the holders of the bonds pressing their claim.

This is the first time the point has been raised. The general principle is clear. If a master, by the terms of the bottomry bond, has bound himself as well as ship and freight for the payment of the bond, it would be manifestly wrong that in defeasance of his own contract he should not only not pay the bond himself, but obtain out of the proceeds of ship and freight payment of his own claims against the owners, leaving the bottomry bondholder unpaid. Hence the rule by which the master's claim is liable, under those circumstances, to be postponed. But this rule frequently operates with great severity against the master, depriving him of his real remedy for recovering his wages and disbursements, and certainly ought not to be carried beyond the exigency of the case; that is, ought not to be extended to circumstances where the bottomry bondholder would not be prejudiced by the master being paid before him. I see no reason why the owners of cargo should be benefited at the expense of the master; for the master, though he may have bound himself for the payment of the bond to the holder thereof, has made no such contract with the owners of cargo, and they are not entitled to invoke a rule made only for the protection of the bondholder.

The Court will therefore pronounce the proceeds of the ship and

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freight to be first applied in payment of the master's claim for wages and disbursements.

Proctors for Master: *Toller & Sons.*

Proctors for Owners of Cargo: *Neal & Philpot.*

June 29.

THE GREAT EASTERN.

Seamen's Wages—Jurisdiction—Damages for Wrongful Discharge—Admiralty Court Act, 1861 (24 *Vict.* c. 10), *s.* 10.

In a cause of wages, the Court of Admiralty has jurisdiction to entertain a claim by a seaman for compensation, in the nature of damages, for wrongful discharge before the term of his engagement has expired.

8 Aspl Mas 330

THESE were consolidated actions, brought by a number of seamen, the crew of the *Great Eastern*, for wages.

The case came before the Court on a motion by the defendants, the owners of the vessel, to reject the petition, which in substance alleged that the master of the *Great Eastern*, in March, 1867, the vessel then being in the port of Liverpool, hired the plaintiffs for a voyage to expire on the 30th of June, 1867; that the plaintiffs entered upon their service on board, and were always ready and willing to perform their contract; but the defendants wrongfully discharged them on the 1st of May, 1867, before the term of their engagement had expired.

The plaintiffs claimed, inter alia, "damages for wages from the 1st of May to the 30th of June."

The following is the section of the Admiralty Court Act, 1861, under which the action was brought:—

24 Vict. c. 10, s. 10: "The High Court of Admiralty shall have jurisdiction over any claim by a seaman of any ship for *wages earned by him on board the ship*, whether the same be due under a special contract or otherwise, and also over any claim by the master of any ship for wages earned by him on board the ship, and for disbursements made by him on account of the ship: provided always, that, if in any such cause the plaintiff do not recover 50*l.*, he shall not be entitled to any costs, charges, or expenses incurred by him therein, unless the judge shall certify that the cause was a fit one to be tried in the said court."

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June 18. *Butt*, in support of the demurrer. The question is, whether a seaman, who is suing the ship in this court for wages, has a lien on the ship for damages occasioned to him by the owner wrongfully discharging him before the termination of the stipulated voyage. It is submitted that there is no such lien, and that the only remedy for the seaman is to sue in a court of common law. If there is no authority for such a lien, the plaintiffs are entitled to the judgment of the Court, for the right of lien cannot be extended, except by the legislature. The seaman's remedy is now a matter governed by statute. The Admiralty Court Act, s. 10, which is the last enactment on the subject, limits his right to recover to "wages earned on board the ship." There is no precedent shewing that a lien for damages for breach of contract has ever been distinctly affirmed in this court, yet the opportunities for claiming such a lien must have been numberless. The truth is, that for wages and towage and salvage, the lien arises out of the service done. The Court has no jurisdiction over a breach of contract, unless a statute specially gives it: *Robert Pow* (1); nor does it exercise the machinery of a jury to whom such claims are submitted. The older cases, when carefully examined, shew that there is really no authority for a lien for the damages, but the contrary. In the case of *Wells* v. *Osman* (2), the seamen who had been engaged for a voyage were discharged, after having done several months' work to the ship whilst lying in the river Thames; and it is quite clear that all that the Court of Queen's Bench decided was, that the Court of Admiralty had jurisdiction to decree the wages for the work done. How is this case consistent with a lien for damages? In *The Exeter* (3), where the mate had been wrongfully discharged without wages abroad, during the voyage, it is true that he claimed 127*l.* as the balance of wages and expenses incurred in returning to Europe, and true also that the Court "pronounced for the demand of wages," but there is nothing to shew that it pronounced for wages beyond the date of the discharge. In *The Beaver* (4), a similar case, the Court did indeed pronounce for the seaman's wages till the return of the ship to Liverpool; but the real contest in the case was, whether the man had deserted or not, and the

(1) Brow. & Lush. 99.
(2) 2 Ld. Raym. 1044; 6 Mod. 238.
(3) 2 C. Rob. 261
(4) 3 C. Rob. 92.

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measure of wages awarded passed without argument. *The City of London* (1) was a case upon demurrer. The mariner had been discharged two days after the articles had been signed for a voyage to the East Indies and back, and before the commencement of the voyage. The ship pursued her voyage; the mariner took other employment, and claimed for the balance between his actual earnings and the amount of wages he would have been entitled to if he had proceeded in the original ship. The case is somewhat difficult to understand, but this is certain, that the Court did no more than admit the petition, and in its observations distinctly held that it could not adjudicate on questions of unliquidated damages which were for juries only. What is also important is, that such cases as that of *The City of London* (1) are now specifically provided for by the 167th section of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), limiting the mariner's right in such cases to one month's wages. *The City of London* (1), therefore, may be said to be overruled by statute. The cases in which this Court has entertained claims of damages for personal injury were apparently all personal actions against the master, not proceedings in rem,—such, for instance, as *The Ruckers* (2), and have therefore no application in this case.

Lushington, and *R. G. Williams*, contrà. It is submitted that the seamen wrongfully discharged have a lien on the ship not only for wages earned, but for wages or damages ultra; and that they have this right by the ancient jurisdiction of the Court. The purpose and effect of the entire Admiralty Court Act, and of the 10th section in particular, was to extend the jurisdiction of the Court. If, therefore, such a right as is now claimed by these seamen existed before that statute, it exists still. The jurisdiction of the Admiralty Court over claims for wages has always been affirmed, and even in days of prohibition, common law judges have upheld it on grounds of convenience: *Wells* v. *Osman*. (3) Here, every reason of convenience points to the seamen taking their remedy in this court for their unlawful discharge; they are already lawfully suing here for their wages earned, and the actions are consolidated: are they now to be sent into another court to bring 300 actions? The legislature has shewn

(1) 1 Wm. Rob. 88. (2) 4 C. Rob. 73. (3) 2 Ld. Raym. 1044.

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its desire to have all the seamen's claims settled in one simple proceeding for wages: see sections 188, 189, 190, 205, 213, 223, and 229 of the Merchant Shipping Act, 1854. Nor can it be said that the Court cannot measure claims of an unliquidated kind. It does so in all cases of salvage and collision; in claims upon bills of lading under the Admiralty Court Act; and it has a special sub-tribunal for the very purpose of settling matters of account, the registrar and merchants, who are at least as competent as a jury. In Parsons on Maritime Law, vol. i. p. 463, is a note citing many authorities to the effect that the Admiralty Court has power to assess damages in these cases of seamen suing for their wages. The theory of the ancient jurisdiction of the Court is, that the contract of wages was regarded as one and entire; that freight was the mother of wages; that accordingly, if freight was earned the entire wages were due. This is evidently the law laid down in the leading case of *Cutter* v. *Powell*. (1) The legislature in the Merchant Shipping Act has now abolished the rule that freight is the mother of wages, and introduced various provisions in the case of wreck, &c.: sections 181—186 of the Merchant Shipping Act; but leaving the law of the Admiralty Court unabridged in cases of wrongful discharge. The authorities cited on behalf of the defendants, such as *The Exeter* (2) and *The Beaver* (3), and such cases as *The Madonna D'Idra* (4), *The Margaret* (5), as also the invariable practice of allowing foreign seamen a viaticum home, shew what the jurisdiction and practice of the Admiralty Court were; but even were it otherwise, they are totally irreconcileable with the notion that the seaman wrongfully discharged cannot recover in the Admiralty Court either damages for the breach of contract or wages beyond the date of the discharge. Perhaps the truth is, that the early theory of the contract of wages being entire was found to be inconvenient and unjust in its operation in many cases, and that even the mariner himself, as in *The City of London* and *The Camilla* (6), did not put forward his full legal rights. But the case of *Chandler* v. *Grieves* (7) is conclusive as to what the

(1) 2 Sm. L. C. 1.
(2) 2 C. Rob. 261.
(3) 3 C. Rob. 92.
(4) 1 Dods. 37.
(5) 3 Hagg. (Adm.) 238.
(6) Swa. 312.
(7) 2 H. Bl. 606, note.

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law of the Admiralty Court was. That was an action of assumpsit for a seaman's wages. The facts of the case were, that the plaintiff was a seaman on board a ship which was articled for and sailed upon a voyage from London to Honduras, from thence to Philadelphia in North America, and from thence back again to England. The articles were drawn in the usual form. While the ship was in the bay of Honduras, the plaintiff received so violent a blow from a piece of timber accidentally falling upon him while he was on board, that he was entirely disabled from doing any duty whatever. On the arrival of the ship at Philadelphia, he was put on shore and there left, and his wages paid up to that time; but the action was brought for the whole wages, including the remainder of the voyage, viz. from Philadelphia to England.

The Court said that clearly the law marine ought to be followed in the construction of the contract, and they directed an inquiry to be made in the Courts of Admiralty, whether, according to the usage there adopted, a disabled seaman in similar circumstances would be entitled to wages for the whole voyage, or only up to the time he was so disabled? An inquiry was made, and in every instance there to be found, a seaman disabled in the course of his duty was holden to be entitled to wages for the whole voyage, though he had not performed the whole.

Butt replied.

Cur. adv. vult.

DR. LUSHINGTON was unable, through illness, to appear in court to deliver the judgment which he had almost prepared; but having consideration for the urgency of the circumstances, stated that he was willing to communicate to the parties through the registrar the result of his decision, upon the condition that it should be accepted as the decision of the Court.

Accordingly, on the 29th of June, the solicitors on both sides being present and consenting, the registrar read the following judgment:—

"The result at which the judge has arrived is, that the Court of Admiralty has, in a cause of wages, jurisdiction to entertain a claim for compensation for wrongful discharge of the seaman during the term of his engagement; the amount of compensation

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to be assessed upon consideration of all the circumstances of the case.

The judge, therefore, rejects the defendants' motion to strike out so much of the petition and schedules thereto as relate to the claim of the plaintiffs for damages, by reason of the alleged breach of contract by the defendants.

If the case proceeds to a hearing, and the allegations in the petition be proved, the Court would refer the amount of compensation to the registrar and merchants."

Motion rejected.

Attorneys for plaintiffs: *Nethersole & Speechly, for J. W. Carr, Liverpool.*

Attorneys for defendants: *Marshall, Westall, & Roberts.*

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ASSIGNEE of bill of lading, rights of 370
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ASSIGNMENT OF CAUSES OF ACTION—*Pleading—Trustee.*] In a suit for building and equipping a vessel, the defendants pleaded that the plaintiffs' claim had vested in their trustee under a composition

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deed; and the plaintiffs in their reply alleged that they had assigned the causes of action before the execution of the deed, and that the suit was now brought in their names as trustees for the assignees. On motion in objection to the reply:—*Held*, that the assignment of the causes of action carried with it all rights of action, which, though inchoate at the time, might subsequently become complete. And that where there is an absolute assignment of a beneficial interest in a debt, the assignor may sue as trustee for the assignee, notwithstanding his subsequent execution of a composition deed.

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BILL OF LADING—*Agent—Assignee for Value—Costs.*] An assignee of a bill of lading is entitled to the goods therein named, if he is a bonâ fide assignee for value, without notice of fraud or insolvency on the part of the person to whom the goods were consigned. G. jun., a merchant of New York, shipped for Bristol, in the *Argentina*, three parcels of oil-cake—two parcels for G. sen., his correspondent there, and the third for Stone. The bills of lading for all three parcels in triplicate he sent to G. sen., strictly enjoining him not to part with the bill of lading of Stone's parcel to him "without first receiving payment." G. jun. drew a bill of exchange for the whole value of the parcels on G. sen., which was discounted. Stone subsequently induced G. sen. to deliver to him his bill of lading, on giving a bill of exchange on one Stiles, and a promise of immediate payment of the cash. Stone, having endorsed the bill of lading to Russell for value, became bankrupt, as also did Stiles. On the arrival of the vessel, Russell had notice served on the master not to deliver the goods but to his order. G. sen. presented one of the copies of the bill of lading, which he had retained, and demanded the delivery of the third parcel shipped for Stone, as well as the other two, to which his title was undisputed. The master refused to deliver the third parcel, and retained thirty-two barrels out of the other parcels for the alleged non-payment of freight, and also refused to deliver the third parcel to Russell. Two suits were brought against the vessel—one by G. sen. for the non-delivery of the third parcel and the thirty-two barrels retained for freight; and the other by Russell, for the non-delivery of the third parcel to his order. The two suits having been heard together, the Court dismissed the claim of G. sen. with costs, and *Held*, 1. That Russell was a bonâ fide assignee for value, without notice of fraud. 2. That G. sen. had authority to deliver the bill to Stone, as the words in the instructions from G. jun. were ambiguous. 3. That Russell was entitled to the goods, and to the costs of his suit against the owners of the vessel.

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BOOTY OF WAR—*Actual Captors—Joint Captors—Right to begin—Jurisdiction—3 & 4 Vict. c. 65, s. 22—Principles of Distribution—*

Association—Co-operation—Right of Commander-in-Chief—General and Personal Staff—Costs.] In a cause of booty of war, the onus probandi lies upon the parties claiming as joint captors as against the actual captors, and they are therefore entitled to begin. The Court of Admiralty had no jurisdiction with respect to booty—property captured on land by land forces exclusively—until the passing of the 3 & 4 Vict. c. 65, the 22nd section of which, enacting that the Court "shall proceed as in cases of prize of war," must be understood to mean, not that in all respects the distribution of booty should be assimilated to that of prize, but merely that the ordinary course of proceeding in prize should be adopted. No person will be entitled to share in booty on the sole ground of meritorious service, unless his claim is supported on the principle of joint capture: nor will the Court relax the principles of joint capture on the ground that part of the property captured was not strictly booty, or that the sum was of unusual magnitude. All prize belongs absolutely to the Crown, which for the last 150 years has been in the habit of granting it to "the takers," who are of two classes—actual captors, and joint or constructive captors. Joint captors are those who have assisted, or are taken to have assisted, the actual captors by conveying encouragement to them or intimidation to the enemy. The union of the joint captor with the actual captor under the command of the same officer alone constitutes the bond of association which the law recognises as a title to joint sharing. Community of enterprise does not constitute association, and is equally insufficient as a ground for joint sharing, if the bond of union, though originally well constituted, has ceased to be in force at the time of the capture. Such co-operation as will confer a title to a joint share of prize is also strictly limited to encouragement to the friend and intimidation to the enemy. The distinctions between captures on land and captures at sea tend to shew that, in considering joint capture of booty, a wider application than is recognised in prize cases must be allowed to the term "co-operation;" concerted action on a vaster scale than is feasible at sea being indispensable to a campaign. The rule of sight, too, which prevails at sea, is inapplicable on land. The general rule for the distribution of booty, to be adhered to as far as possible, in accordance with naval prize decisions, is the rule of actual capture. In the case of an army consisting of several divisions, the line of distribution, in analogy to the rule of the naval service, and in conformity to military usage, will be drawn between division and division; that division to be regarded as the actual captor, any portion of which has captured the prize. The association entitling to joint sharing must be military, and not political, and must be under the immediate command of the same commander. The co-operation which is necessary as a title to joint sharing, is a co-operation directly tending to produce the capture in question. What tends to produce the capture cannot be once for all defined, but strict limits must be observed of time, place, and relation. Services rendered at a great distance from the place of capture, acts done long before the capture was contemplated, even though they affect the whole scene of operations, cannot be deemed such co-operation as will give a title to share in booty. Indirect services will be insufficient. To entitle the commander-in-chief to share in booty, he must himself be in the field; but "to be in the field," it is not necessary that he should be actually present with the division that makes the capture; being in the field with one division, he is in the field with all. But, if troops have been placed under the INDEPENDENT command of another, the commander-in-chief, though actually in the field, does not share in booty taken by those troops. No distinction should be made in the right of the general and personal staff to share in booty; in principle, the right of

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both stands or falls with that of the commander-in-chief; therefore all his staff who are in the field with him are entitled to share. Under the circumstances of the case, the costs of the rejected claimants ordered to be paid out of the fund.
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BOTTOMRY BOND—*Answer by Mortgagee.*] Transactions between the owner and mortgagee of the vessel, which might render the voyage illegal, cannot invalidate a bottomry bond given by the master to a bonâ fide lender, who has only to look to the facts that the ship is in distress, that the master has no credit, and that the money is required for necessary purposes.
THE MARY ANN 13

2. ——————, *Payment by Bondholders of Wages, &c., of Foreign Seamen—Repayment to Bondholders out of Proceeds of Sale of Ship.*] The Court will not, unless upon application being made to it, sanction the repayment of wages, &c., to bondholders out of the proceeds of the sale of a ship.
THE CORNELIA HENRIETTA. CASSELS 51

3. ——————, *Prior Charges on Ship.*] The Court granted leave to bondholders to pay prior charges, and to have a lien on the ship, cargo, and freight, in respect of such payments, which were small in amount, on an affidavit specifying the charges to be paid.
THE FAIR HAVEN 67

4. ——————, *Master's Claim—Priority—Marshalling Assets.*] The general rule that a master who has bound himself as well as ship and freight for the payment of a bottomry bond is not entitled to payment of his own claims in priority, will not be acted upon where the bottomry bondholder will not be prejudiced by the master being paid before him. Where a master gave bonds on ship, freight, and cargo, binding himself, and the bonds would exhaust ship and freight, thus defeating the master's claim:—*Held*, that the master's claim should have priority over the claims of the bondholders, thus marshalling the assets between them.
THE EDWARD OLIVER 379

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CAUSE OF POSSESSION—*Plaintiffs beyond the Jurisdiction of the Court—Security for Damages.*] Plaintiffs beyond the jurisdiction of the Court, in a cause of possession, though liable to give security for costs, will not be required, as a general rule, to give security for damages.
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CHURCH DISCIPLINE ACT (3 & 4 *Vict. c.* 86), *ss.* 20, 23—*Admissibility of Articles—Form of Charges in Commission and Decree—Jurisdiction.*] The jurisdiction of the Court of Arches with respect to charges under the Church Discipline Act commences with the issue of the decree; the Court, not being a court of appeal, has no authority to inquire into any errors of the commissioners appointed under that act. In a commission appointed by a bishop, under the Church Discipline Act, to inquire into charges against a clergyman, it was not directly alleged that the offences had been committed within two years then last past; but the charges were laid in the present tense: viz. "that Mr. S. *has* lights on the communion table," &c. The commissioners overruled an objection taken to this wording of the charges, and found on evidence that there was sufficient ground for proceeding. Letters of request were then sent up to the Court of Arches. Thereupon the decree was issued, setting forth the charges in the same words as in the commission. The articles filed specified that the offences had been committed within two years.

THE OFFICE OF THE JUDGE PROMOTED BY FLAMANK AGAINST SIMPSON 276

CHURCH-RATE—*Inequality—Pleadings—Evidence*—6 & 7 *Wm.* 4, *c.* 96; 25 & 26 *Vict. c.* 103.] A defendant in a suit for subtraction of church-rate may by his allegation plead that he is assessed at too low a rate, and is not bound to aver or shew that he himself is injured by the inequality of the assessment of which he complains. The rent paid for lands is not a conclusive test of their value; and an assessment under the Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103), founded principally on the basis of the rent paid, and not the rent at which the property might reasonably be expected to let from year to year, according to the provisions of section 1 of the 6 & 7 Wm. 4, c. 96, is erroneous. An assessment, made under the 25 & 26 Vict. c. 103, is evidence only, not proof, of the accuracy or inaccuracy of a valuation upon which a church-rate is made; and where a church-rate was made, in 1863, upon an old valuation of 1839, and there was no proof of any great inequality or change of value having in the interval taken place in the properties comprised in it, the Court refused to disturb the rate, upon the mere production of a new assessment made under the act, and which differed from the old valuation.

EDWARDS AND MANN *v.* HATTON 21

2. ——————, *Inequality—New Assessment*—6 & 7 *Wm.* 4, *c.* 96—25 & 26 *Vict. c.* 103.] In making a church-rate, the parishioners are not bound to adopt the valuation made by an assessment committee, under the 25 & 26 Vict. c. 103. Where a church-rate was made upon the basis of an old valuation originally made for the purposes of poor-rate and in accordance with the 6 & 7 Wm. 4, c. 96, and which had been since from time to time corrected, and acted upon and acquiesced in for a great number of years, the Court refused to disturb the rate, merely on the ground that a new valuation, made under the 25 & 26 Vict. c. 103, differed from the old one.

BARNES *v.* GRANT 37

3. ——————, *Irregularity in Proceedings of Vestry—Excessive Rate—Legal Expenses.*] At a vestry meeting, a motion having been made and seconded that a rate be made, an amendment was proposed that it was not legal or expedient to make a church-rate for the district. The amendment, and afterwards the original question, was put to the meeting; the first was negatived and the latter carried. A poll was demanded on the amendment only, and the vestry was adjourned for that purpose. On the day to which the vestry had been adjourned, the chairman declared the state of the poll under the headings—the

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number for the amendment and against the rate—the number against the amendment and for the rate; and declared the majority to be for the rate; and then dissolved the meeting without having put the original motion a second time:—*Held*, that the proceedings, though irregular, were not sufficiently so to vitiate the rate. A charge for the attendance of a legal adviser at the taking a poll, for legal assistance in making a church-rate, or for the salary of an organist in a wealthy town parish, if such charges have been sanctioned by the vestry, may be lawfully paid out of a church-rate, and a rate made to cover them will not be excessive.

TIARKS AND FENNING *v.* HUTTON 270

4. CHURCH-RATE, 53 *Geo.* 3, *c.* 127—*Order made by Magistrates withdrawn—Res Judicata—Ecclesiastical Court—Jurisdiction.*] A parishioner having been summoned before the magistrates of his parish, under 53 Geo. 3, c. 127, for non-payment of a church-rate under 10*l.*, informed them that he disputed the validity of the rate; the magistrates, nevertheless, made a verbal order upon him for payment; but on a subsequent day withdrew the order, and informed him of such withdrawal by letter. The churchwardens then instituted proceedings to enforce the rate; the defendant appeared under protest:—*Held*, that the matter was not res judicata, and that the Ecclesiastical Court had jurisdiction to enforce the rate.

LINNELL AND WALKER *v.* GUNN 363

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COLLISION—*Arrest of Vessel—Liability of Cargo—Release on Bail—Re-arrest.*] A plaintiff in a cause of collision suing ship and freight may always arrest the cargo for freight, and if freight be not due, will not therefore incur costs and damages; but on affidavit that no freight is due, and that he is ready to carry on to destination, the defendant, owner of the ship sued, is entitled to have the cargo released. After property arrested has been released on bail the plaintiff is not entitled to re-arrest it, although the defendant has consented to have the amount of the action increased. The plaintiff having re-arrested in such case, the Court made an equitable order, allowing the re-arrest to stand, but cancelling the bail-bond, and directing that the value of the ship (which had been repaired since the release) should be estimated at the time of the first arrest.

THE FLORA. DE LACA 45

2. ———, *Evidence.*] In a cause of collision, the books, containing the entries made by the coastguard, and sent to the coastguard office, are admissible in evidence to prove the state of wind and weather at the time of the collision, without calling the person who made the entries.

THE CATHERINA MARIA 53

3. ———, *Sailing Rules, Articles* 13, 14, 19.] Article 13 of the Sailing Rules (under 25 & 26 Vict. c. 63, s. 25) provides that "if two ships under steam are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other." Art. 14. "If two ships under steam are crossing, so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other." Art. 19. "In obeying and construing these rules, due regard must be had to all dangers of navigation; and due regard must also be had to any special circumstances which may exist in any particular case, rendering a departure from the above rules necessary, in order to avoid immediate danger." In a cause of collision between two steam-vessels meeting nearly end on in the river Thames, it was

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alleged by the defendants that the helm of their vessel was put a-starboard to avoid a barge:—*Held*, that the onus of proving that a departure from the 13th rule was "necessary, in order to avoid immediate danger," lay upon the defendants; and that, in the absence of sufficient evidence to shew what became of the barge, the defendants had failed in their proof, and were, therefore, to blame for the collision, the result of not porting their helm.

THE CONCORDIA 93

4. COLLISION—*Sailing Vessels crossing—Sailing Rules, Articles* 12, 18, 19.] The 12th article of the Sailing Rules (under 25 & 26 Vict. c. 63, s. 25) provides that, "When two sailing ships are crossing, so as to involve risk of collision, then, if they have the wind on different sides, the ship with the wind on the port side shall keep out of the way of the ship with the wind on the starboard side; except in the case in which the ship with the wind on the port side is close hauled and the other ship free, in which case the latter ship shall keep out of the way; but if they have the wind on the same side, or if one of them has the wind aft, the ship which is to windward shall keep out of the way of the ship which is to leeward." Art. 18. "Where, by the above rules, one of two ships is to keep out of the way, the other shall keep her course subject to the qualifications contained in the following article." Art. 19. "In obeying and construing these rules, due regard must be had to all dangers of navigation, and due regard must also be had to any special circumstances which may exist in any particular case, rendering a departure from the above rules necessary, in order to avoid immediate danger." A collision took place between two sailing vessels crossing, the wind being about S.S.E., and the vessel C. steering about N.N.E., the vessel S. about W. by S.; the vessel C. did not "keep out of the way," but kept her course, and the vessel S., instead of keeping her course, ported her helm, alleging "immediate danger" as a reason for so doing:—*Held*, that both vessels were to blame—the vessel C. for not having kept out of the way, in accordance with the provision in the last clause of the 12th article; and the vessel S. for not having kept her course, but having improperly ported her helm, there being no evidence of "immediate danger" to justify a departure from the 18th article.

THE SPRING 99

5. ———, *Limitation of Liability—Merchant Shipping Act Amendment Act*, 1862 (25 & 26 *Vict. c.* 63), *s.* 54.] In a cause of limitation of liability, under the 54th section of the Merchant Shipping Act Amendment Act, 1862, arising out of a collision, the plaintiffs alleged that the collision occurred without their fault or privity. It was proved that the master, who was also part owner of the vessel sued, was on board at the time of the collision, but not on deck, the vessel being then in charge of the second mate and a coasting pilot:—*Held*, that under these circumstances there was no obligation upon the master to be on deck; that the fact of his being part owner was no reason for charging the other owners with blame; and that the fact of his being on board at the time of the collision was not in itself sufficient to shew that it occurred with his "fault or privity."

THE OBEY. LE GROS 102

6. ———, *Compulsory Pilotage*—6 *Geo.* 4, *c.* 125, *s.* 59—*Order in Council*, 18*th February*, 1854—*Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104) *ss.* 353, 376, 379—*Passenger*.] The exemption from compulsory pilotage in the 59th section of the 6 Geo. 4, c. 125, does not apply to a foreign vessel without a British register. Compulsory pilotage is not a charge upon vessels, but is a regulation instituted for their benefit. The exemptions from compulsory pilotage contained in

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the Order in Council of the 18th of February, 1854, which, by the 353rd section of the Merchant Shipping Act, 1854, are equally in force with the exemptions in the 59th section of 6 Geo. 4, c. 125, do not apply to a foreign vessel, inward bound, not having a British register, and coming up by the North Channel. A vessel having on board a person who did not pay for his passage, who messed with the captain, and who assisted in the work of the ship, *held* to be exempt from compulsory pilotage under the 379th section of the Merchant Shipping Act, 1854.
THE HANNA 283

7. COLLISION—*Claim for Salvage by Crew of Vessel found to blame.*] A collision occurred between two vessels. Both were found to blame. A cause of salvage was instituted by the master and crew of one of the vessels for having saved a quantity of specie laden on board the other vessel:—*Held*, that the salvors were not entitled to reward for saving property which they had by their own wrongful acts contributed to place in jeopardy.
CARGO EX CAPELLA 356

8. ———, *Compulsory Pilotage "into and out of" the Port of Kingston-upon-Hull—2 & 3 Wm. 4, c. cv. ss. 22, 89.*] The employment of a Humber pilot is not compulsory upon a vessel which is being towed from one dock to another in the port of Hull, as a vessel is not, in such circumstances, either passing "into or out of" the port, within the terms of the 22nd section of the Hull Pilot Act, or "bound to or from the port," within the terms of the 89th section of that act.
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COSTS—23 & 24 *Vict. c.* 127, *s.* 28—*Suit by Master for Wages—Counter Claim by Owner—Attorney's Charge on Property "recovered or preserved."*] On a claim by a master for his wages and disbursements being referred to the registrar and merchants, a counter claim was made by the registered owner of the whole ship, which counter claim included money due from the master under an agreement to purchase certain shares in the ship. In the result it was found, that 103*l.* 7*s.* 8*d.*

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was due to the plaintiff on the balance of his account as master, and 173*l.* 11*s.* 1*d.* was due *from* him on account of the counter claim, thus leaving a balance due from the plaintiff. On a motion by the plaintiff's attorney, under the 28th section of 23 & 24 Vict. c. 127, that he might have a charge for his costs in the suit upon the plaintiff's interest in the ship as being property "recovered or preserved":—*Held*, that as the result of the suit to the plaintiff was, that he was entitled to a transfer of the shares in the vessel for a less sum than he would have been if the suit had not been instituted, the plaintiff's attorney had recovered or preserved the property to the plaintiff, and was entitled to a charge upon it for his costs to an amount not exceeding the sum so preserved.
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FACULTY—*Grant of, to Bury in a Vault in Private Grounds—Consecration—Jurisdiction of Consistorial Court.*] The Consistorial Court of Winchester decreed a grant of a faculty to bury in a family vault under the chancel of a church standing in the private grounds of the applicant, the entrance to the vault being only from without the building, and the approach to it being on unconsecrated ground. The vault had been made under an old chapel, in which divine service had been performed from a very early period; the chapel had been pulled down, and on its site the church had been erected, and duly consecrated:—*Held*, on appeal, that the constant performance of divine service in the chapel raised primâ facie the presumption that the chapel had been consecrated, and therefore that the jurisdiction of the Consistorial Court attached upon it; That the consecration of a church or chapel extends to the vaults beneath; That it is not necessary that the officiating clergyman should stand on consecrated ground while performing the burial service.
RUGG *v.* KINGSMILL 343

FREIGHT—*Pro ratâ itineris—Reasonable Time to Re-ship and Tranship—Abandonment—Proceeds of Sale of Cargo—Claims for pro ratâ Freight, Costs, Disbursements.*] Where a vessel is disabled at an intermediate port, the master is allowed a reasonable time to re-ship and tranship, so as to earn his freight. The whole freight is payable if, by default of the owner of the cargo, the master is prevented forwarding the cargo from an intermediate port to its destination. No freight is payable if the owner of the cargo is compelled against his will to take the cargo at an intermediate port. To sustain a claim for pro ratâ freight, there must be such a voluntary acceptance of the goods by their owner at an intermediate port as to raise a fair inference that further carriage of the goods was dispensed with. A vessel was chartered at a port in Sweden to carry a cargo of deals to Bordeaux, freight

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being payable on delivery. She became disabled, and on the 2nd of October, 1865, was towed by three smacks into an English port; a salvage suit was instituted (7th October), and the vessel was arrested by order of the Court. The master employed shipbrokers at the port as agents for the owners of the vessel; and through the agent for the Norwegian Lloyd's Association, instructed proctors to enter an appearance in the salvage suit for the owners of the ship and the cargo. Notice was sent by the agents and by the proctors to the owners of the cargo, informing them of the condition of the ship, and that the cargo would be sold, but no instructions were received from them. The cargo was discharged, and, the vessel being found not worth repairing, the master and crew (24th October) abandoned her. The cargo was sold (16th December) by order of this Court, and out of the proceeds a sum was awarded to the salvors. The ship had been abandoned to the proprietors of the graving dock. On a motion by the owners of the vessel for payment of freight pro ratâ out of the balance remaining in the registry:—*Held*, that the owners of the cargo having had notice that their cargo would be sold, had waived their right to have their cargo carried to Bordeaux, and thereby impliedly promised to pay a pro ratâ freight; That the proctor's costs were the first charge upon the fund in court; That the agents employed at the port were entitled to such part of their charges as consisted of necessaries supplied to the ship, but not to such disbursements as were in the nature of general average expenses. The Court directed, first, that the proctors be paid their costs; secondly, the agents their charges for necessaries; and, thirdly, the owners of the vessel their pro ratâ freight, less the claim of the agents for necessaries.

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ILLEGALITY—*Wages—Breach of Blockade.*] By principle, authority, and usage, it is not a municipal offence by the law of nations for a neutral to carry on trade with a blockaded port. In a suit for wages, upon an agreement entered into for the purpose of breaking the blockade of the Confederate States of America—an article in the defendants' answer alleging such agreement to be contrary to law ordered to be struck out.

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MASTER—*Wages—Disbursements— Maritime Lien — Admiralty Court Act*, 1861 (24 *Vict. c.* 10, *s.* 10).] Under the 10th section of the Admiralty Court Act, 1861 (24 Vict. c. 10), the master has a maritime lien both for his wages and disbursements, and his claim is therefore to be preferred to the claim of a mortgagee.
THE MARY ANN 8

2. ————, *Costs—Wages.*] A master suing for wages and disbursements is bound to furnish accounts before bringing his suit; if he do not, he will not be entitled to his costs.
THE FLEUR DE LIS. TAYLOR 49

3. ————, *Disbursements—Expenses incurred by Master in defending himself against Charge of Murder.*] A master, while at a foreign port with a homeward-bound vessel, incurred expenses in defending himself against a charge of murder maliciously brought by two of the crew, whom he had censured for misconduct. The master was tried and acquitted, and bound over in a sum of 10*l.* fo prosecute the men for perjury. He forfeited the 10*l.* in order to return with the vessel to England:—*Held*, on a motion to review the report of the registrar in a suit for disbursements: 1st. That the master was entitled to the expenses of his defence, on the ground that the charge originated directly from the performance of his duty to his owners in chastising the men. And, 2ndly, the Court allowed the 10*l.* forfeit, as it was for the interests of his owners that the master should not be delayed in returning with the vessel.
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MERCHANT SHIPPING ACTS—17 & 18 *Vict. c.* 104, *ss.* 66, 70—25 & 26 *Vict. c.* 63, *s.* 3—*Co-owners—Cause of Restraint—Mortgage.*] Under the 66th section of the Merchant Shipping Act, 1854, and the 3rd section of the Merchant Shipping Act Amendment Act, 1862, the Court will look behind the register to the real character of transactions between co-owners, and treat as a mortgage that which is on the face of it an absolute transfer, if it should appear that such was the intention of the parties. Under the 70th section of the Merchant Shipping Act, 1854, a mortgagee not in possession of the vessel cannot maintain an action of restraint.

Semble, the Court would in some cases recognise an agreement by which a person might be for some purposes an absolute owner, and for others a mortgagee, if such an agreement were clearly proved and definite. A vessel having been arrested in a cause of restraint between co-owners, the Court, on a motion by the charterer, to whom the vessel had been let for a voyage, ordered her release; it appearing that the alleged co-owner was only a mortgagee.

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MORTGAGE—*Equities between Owner and Mortgagee—Merchant Shipping Act Amendment Act*, 1862 (25 & 26 *Vict. c.* 63), *s.* 3—*Admiralty Court Act* (24 *Vict. c.* 10), *s.* 11—*Unlawful Arrest—Costs and Damages—Fraud.*] Where an action has been brought in the Admiralty Court under 24 Vict. c. 10, s. 11, by the registered transferee of a mortgage, and the ship arrested, the Court will, in conformity with the 3rd section of the Merchant Shipping Act Amendment Act (25 & 26 Vict. c. 63), enforce equities between the owner and the mortgagee; and will, in estimating the right of the mortgagee, consider not only the registered documents, but all the transactions between the parties relative to the mortgage loan. The plaintiff was the registered transferee of a mortgage expressed to be given as security for the payment of an acceptance on a certain date, which date was past before action brought; but he had, by other arrangements, contemporaneous and subsequent to the transfer, agreed for postponing repayment, and by such arrangements repayment of no part of the money was due at the time of action brought; and it was not proved that the owner had done anything impairing the security of the mortgagee. The action was dismissed with costs. The plaintiff was further condemned in damages, on the ground that with adequate knowledge of the circumstances he had arrested the ship when no money was due to him—after a decision, moreover, of magistrates, adverse to his claim; and that he had endeavoured to make good his claim by bringing charges of fraud, which he failed to sustain, against the owner. Various circumstances alleged to shew fraud considered.

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2. MORTGAGE—*Material Men—Possessory Lien—Priority.*] Mortgagees of a ship are entitled to payment in priority to material men, who at the time of supplying the materials were not in such actual possession of the ship as to give them a possessory lien over her.
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MORTGAGE SUIT—*Costs, Charges, and Expenses—Taxation—Items disallowed.*] Mortgagees' costs in a mortgage suit will be taxed as between party and party in accordance with the practice of the Court of Chancery, and not as between solicitors and clients, where a decree has been made by consent that the plaintiffs are to receive their "costs, charges, and expenses properly incurred." On a motion by plaintiffs, mortgagees, to review the registrar's taxation, disallowing: 1st, charges by plaintiffs' solicitors for attending to take particulars of other suits against the vessel to which the plaintiffs were not parties; 2ndly, costs of negotiations between rival incumbrancers which led to nothing, and to which the owners of the vessel were not parties; 3rdly, costs of conference with counsel at a stage of the suit when it is not usual for a conference to be held. The Court affirmed the registrar's taxation, and refused the motion with costs.
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NECESSARIES—*Admiralty Court Act* (24 *Vict. c.* 10), *s.* 5.] The expenses of an agent for coming from Newcastle to London to assist the master in the defence of a vessel prosecuted in a cause of collision, and for attending the trial:—*Held*, not to be necessaries.
THE BONNE AMELIE 19

2. ————, 3 & 4 *Vict. c.* 65, *s.* 6.] A claim for money advanced to a master to pay averages, dismissed with costs, such advances not being "necessaries" within the meaning of the 6th section of the 3 & 4 Vict. c. 65.
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3. ————, *Mortgagee—Pleading.*] A reply in a cause of necessaries, leaving it doubtful whether the person in possession of the vessel at the time of the supply was the original mortgagee or the defendant, the transferee of the mortgage, is bad. A mortgagee in possession would not be liable for necessaries supplied, unless the master in ordering them acted as the agent of the mortgagee. An allegation that a defendant was in possession of the vessel at the date of the supplies, and personally liable for them, would not be a good reply to an answer of a defendant claiming to be a mortgagee prior to the date of the supply.
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PLEADING—*Collision.*] It is not necessary for the plaintiffs in their petition to state every fact material to their case—as that they complied with certain sailing rules—but it lies upon the defendants to allege the violation of such rules.
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SALVAGE—*Appraisement.*] An appraisement made by the marshal of the Court will be held conclusive as to the value of the property salved.
THE CARGO EX VENUS 50

2. ————, *Agreement to Tow—Facts withheld.*] The owners and crew of a tug sued for salvage services, alleging that an agreement entered into for towage service was invalid, by reason of the fact of the illness of a great part of the crew of the vessel salved having been withheld. No danger to property being proved:—*Held*, that there was no salvage service; and the Court pronounced for the agreement with costs.
THE CANOVA. BROWN 54

3. ————, *Costs of Appraisement.*] Salvors are entitled to the costs of a commission of appraisement where there is a substantial difference between the appraised value and that stated by the defendants.
THE PAUL 57

4. ————, *Appeal from Award of Justices—Invalid Agreement.*] An agreement for a sum of 8*s.* 6*d.*, as a reward for salvage services, set aside as futile, where it appeared that there was real danger incurred by the salvors in rendering the service.
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5. ————, *Contract to Tow.*] Where the master of a steamer engages to tow a vessel, it is upon the supposition that the wind and weather and the time of performing the service will be what are ordinary at the time of year; but if an unexpected change of weather, or other unforeseen accidents occur, he is bound to adhere to the vessel, and to do all in his power to rescue her from danger; and he will be entitled to reasonable extra remuneration for the extra service. Circumstances under which such extra remuneration was allowed.
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6. ————, *Owners of salving and Charterers of salved Vessel the same Persons—Pleading.*] The owners of a vessel rendering salvage services, being also the charterers of the vessel receiving the services, are not thereby debarred from claiming salvage reward, unless the effect of the charterparty has been to divest the owners of the possession and control of the salved vessel, and to transfer the same for the time to the charterers. The *Maria Jane* distinguished. The *Waterloo* followed. On a motion by the plaintiffs, salvors, in objection to certain articles of the defendants' answer, which averred that, though the services rendered might be of the nature of salvage service, yet that, because the owners of the salving, and the charterers of the salved, vessel were the same persons, no salvage was due; the Court ordered the article denying that any salvage was due to be struck out, but not the other articles detailing the facts, which, if proved, might not bar the claim for salvage, but might affect the quantum.
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7. SALVAGE—*Services rendered by Agents—Tender before Suit—Costs.*] Where ship-agents render extraordinary services in saving property, the Court will, under particular circumstances, allow a claim as agent and a claim as salvor to be united. The plaintiffs, ship-agents, were engaged by the defendants, owners of the cargo, to discharge a cargo of flour wrecked on the beach. The plaintiffs, in rendering the service, incurred no personal risk, but disbursed for wages &c. about 119*l.* The defendants tendered to the plaintiffs 150*l.*, which was refused; they afterwards paid them, through the auctioneer who sold the cargo, 50*l.*, as part of the commission on the sale. The plaintiffs then sued for salvage services. The defendants paid 150*l.* into court, altogether 200*l.*—80*l.* in excess of the plaintiffs' disbursements. The Court held that the sum of 80*l.* was sufficient, whether the services were salvage or agency, and gave judgment for the defendants; and, as they had made a sufficient tender in time to prevent litigation, with costs.
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8. ———, *Amount—Distribution.*
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9. ———, *Services rendered within the Boundaries of the Cinque Ports—1 & 2 Geo. 4, c. 76—Concurrent Jurisdiction of the High Court of Admiralty—17 & 18 Vict. c. 104, s. 460; 25 & 26 Vict. c. 63, s. 49.*] The general words in the 49th section of the Merchant Shipping Act Amendment Act, 1862, which extends the provisions of the 460th section of the Merchant Shipping Act, 1854 (giving summary jurisdiction to two justices in salvage suits), to *all* cases in which the value of the property saved does not exceed 1000*l.*, refer to the latter part of the 460th section, which provides for cases only where "the sum claimed does not exceed 200*l.*," and occurring in the United Kingdom "elsewhere than within the boundaries of the Cinque Ports;" and do not refer to the earlier part of that section, which provides that "disputes with respect to salvage arising within the boundaries of the Cinque Ports shall be determined in the manner in which the same have hitherto been determined." The concurrent jurisdiction, therefore, of the High Court of Admiralty with the Court of Admiralty of the Cinque Ports and the commissioners appointed by the Lord Warden under the statute 1 & 2 Geo. 4, c. 76, over salvage causes arising within the boundaries of the Cinque Ports, is not affected by the Merchant Shipping Act Amendment Act, 1862.
THE JEUNE PAUL 336

10. ———, *Value of Property at the Time of rendering the Service—25 & 26 Vict. c. 63, s. 49.*] The words in the 49th section of the Merchant Shipping Act Amendment Act, 1862, determining the jurisdiction of the Court by the value of the property saved, mean the value of the property when first brought into safety by the salvors, and not its value at any subsequent period.
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WITNESS—*Costs.*] The expenses of detaining a witness will not be allowed, unless it can be shewn that his detention was absolutely necessary to ensure his attendance as a witness, and was not for any other purpose, *e.g.* merely to watch the proceedings in a suit. A master's expenses at the rate of 1*l.* a week allowed from the arrest of the vessel in March, 1863, to July, 1864, when the defendants applied to have the cause put off.
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BIBL. LONDIN. UNIV.

LONDON:
PRINTED BY WILLIAM CLOWES AND SONS, STAMFORD STREET
AND CHARING CROSS.